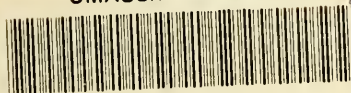


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ADMINISTRATION PROPOSAL THREATENS FIRST
AMENDMENT RIGHTS OF GOVERNMENT
GRANTEES AND CONTRACTORS

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HEARING

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

MARCH 1, 1983

Printed for the use of the Committee on Government Operations



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ADMINISTRATION PROPOSAL THREATENS FIRST AMENDMENT RIGHTS OF GOVERNMENT GRANTEES AND CONTRACTORS

TUESDAY, MARCH 1, 1983

HOUSE OF REPRESENTATIVES,
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2154, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Henry A. Waxman, Tom Lantos, Frank Horton, and William F. Clinger, Jr.

Subcommittee staff present: Richard C. Barnes, staff director; Cynthia Meadow, professional staff member; Linda Shelton, office manager; Mary Alice Oliver, secretary; full committee staff: William M. Jones, general counsel; Robert Brink and Donna Fossum, professional staff members; John M. Duncan, minority staff director; Thomas F. Houston and Stephen M. Daniels, minority professional staff members, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. Brooks. The subcommittee will come to order.

The right to free speech, to due process of law, and to approach the Government for the redress of grievances are some of the most fundamental precepts of our Constitution. Judging from the outcry generated by a recent proposal by OMB, the DOD, the GSA, and NASA to revise regulations concerning cost principles for contractors and grantees, these constitutional freedoms appear to be in grave danger.

Under the guise of better management, the administration wants to demand that a host of businesses, organizations and individuals across this Nation give up their right to participate in the governmental process if they are to receive Federal grants and contracts. A wide spectrum of organizations and individuals from all walks of life have attacked the proposals as a "gag rule" which would throttle the free speech of Federal contractors and grantees.

In late January, the administration proposed changes in OMB Circular A-122 and the procurement regulations of DOD, GSA, and NASA that, on their face, were designed to prevent the recipients of Government contracts and grants from using Federal funds to support lobbying activities. I fully agree with the premise that unless specifically authorized, Federal dollars should not be spent

by contractors and grantees to lobby the Congress. Opponents of the administration's proposed revisions allege, however, that the dragnet approach is so broad as to sweep into its path legitimate lobbying activities carried on with non-Federal funds.

The proposed regulations mark an abrupt departure from longstanding principles of cost allocation between Federal and non-Federal funds. Rather than simply banning the use of Federal dollars for lobbying activities, the proposed regulations may, in effect, condition the acceptance of Government funds upon the waiver of constitutional rights. The proposed changes would define "political advocacy" so broadly as to include virtually any attempt to comment on public policy issues.

When the Reagan administration came to town 2 years ago and began slashing away at Federal social programs, they claimed that nobody would really be hurt by those budget cuts. The "truly needy," they said, would still be taken care of by the administration's "safety net" and that the gap left by Federal cutbacks would be filled by local nonprofit social service agencies. Now it appears that the administration would deny those same local nonprofit organizations—the very groups who have firsthand real-life experience with how changes in social programs affect people—the opportunity to comment on regulatory reform proposals, on block grant implementation, on legislation, and other vitally important activities of Federal, State, and local government.

It is important to note, however, that it is not only organizations representing the poor, the elderly, the handicapped, and children that have sounded the alarm about this proposal. They are joined in their anguish by such "left wing," "bleeding heart" organizations as the U.S. Chamber of Commerce, the National Association of Manufacturers, the Electronic Industries Association and others, hundreds of others.

It is heartwarming to see the ACLU, the U.S. Chamber, the League of Women Voters, the American Heart Association, and the Ford Motor Co. embrace each other in this joint effort to resist Government oppression. I applaud them all for their alertness to the need to exercise their civic responsibilities.

Late last Friday the administration issued a statement saying that even though the comment period for the current proposal had not yet expired, they were preparing to issue a revised proposal. Apparently the unfairness and the impracticality of this proposal has finally come to the attention of important officials at the other end of Pennsylvania Avenue. We are proceeding with this hearing, however, to assure that the issues are given a full public airing.

During the course of this hearing we intend to probe what prompted this proposal, if a serious problem exists which needs to be solved, whether a more tempered approach is advisable, what effect it will have on Federal contractors and grantees, its effect on the ability of Government agencies and the Congress to make informed decisions, and the legality and the constitutionality of these proposals.

Over 30 witnesses are scheduled to testify and numerous others are submitting written statements. They represent hundreds of major organizations throughout this country. I have asked all the witnesses to limit their prepared comments to no more than 5 min-

utes in the hope that we can hear all of them. I hope that the testimony received at this hearing will be heard by appropriate officials of the executive branch and that they will be encouraged to exercise their responsibilities with a sense of fairness and equity.

Before proceeding I would like to call on the senior Republican leader of the committee, Mr. Frank Horton, the distinguished member from New York.

Mr. HORTON. Thank you, Mr. Chairman.

First of all I want to say that this proposed regulation came to my attention when I was having office hours in my district. Two weeks after we were sworn in, I had office hours in Oswego, Oneida, Cayuga, Seneca, and Wayne Counties. I saw over 3,000 people. Several of those people came in to me and said, "You know, next year I can't come in and talk to you." I said, "Why not?" And they said, "Because of this proposed regulation." But when I first received a copy of it, I just couldn't believe it. I got in touch with my staff and was pleased to learn that we were having this hearing today.

I am very much opposed to this proposed regulation, and I was glad to hear from Mr. Wright of OMB this morning that his agency intends not to go forward with it.

Mr. Chairman, I have a rather lengthy statement this morning. I would like to make part of it, and I would like to ask unanimous consent to revise and extend my remarks and include the full text of my statement in the record.

Mr. BROOKS. Without objection.

Mr. HORTON. Mr. Chairman, I find myself in a difficult position. An administration headed by a President of my own political party has issued a proposed regulation which is under review by my committee. I want to support the administration. I generally agree with them. All other things being equal, I would support them even if I were not overly enthusiastic about one of their proposals. But much as I would like to be able to defend the administration on this issue, I cannot.

I support the principle that private groups should not use Government funds to lobby their government; on that, Mr. Chairman, I certainly agree with you. I don't think we ought to be issuing grants for people to lobby. A Government agency should not award grants and contracts to organizations which use those awards just to further their own political aims.

But the proposed regulation before us this morning in addressing these concerns goes way beyond the bounds of propriety. It says to citizens that if their salaries are a result of a Government contract or grant, they cannot comment during working hours on Government activities. They may not communicate with legislators or executive branch policymakers. They may not even in the normal course of business—to quote item b.(3) of the proposal—try to influence governmental decisions through an "attempt to affect the opinions of the general public or any segment thereof." That's a gag rule if I've ever heard of one.

As a legislator concerned with the proper operation of all Government activity, I am strongly opposed to any regulation that would limit the opportunities of citizens working on Government grants and contracts from talking with me about their work.

We are not talking here about what expenses can legitimately be claimed as reimbursable under an award or even what can be tax deductible. We are talking about what a citizen can do with his own money on time not paid for by the Government. If any portion of his salary comes from a cost-based contract or grant, the proposal doesn't say that he can't use Government money to express an opinion about a public issue. It says that if he receives any Government money through an award based on cost, he cannot express an opinion on public matters and still be compensated.

Mr. Chairman, this is positively outrageous. I cannot believe that this could possibly be the intent of the administration, and yet the language is painfully clear.

So I am very happy that I was informed this morning that Mr. Wright later will indicate that this particular proposal is out the window, but I agree with you that we should hear comments from people that are concerned about it. I am concerned about it, and I hope the administration is, too. As I told Mr. Wright, there are always two ways to do something. One is the easy way and the other one's the tough way. The administration is going about this project the tough way. I think that if they have a problem, they had better tell us about it; look at the problem very carefully and then come up with something that is reasonable and meaningful. I don't think anybody in this room wants to have Federal money go for lobbying. That is not the intent of the taxpayers and everybody in this room is a taxpayer.

But on the other hand, we certainly don't want to stifle public opinion and the right of people to speak out on issues and problems that concern them. This was certainly not the way to prevent Federal money from being used for lobbying. And if there is any attempt to do it in the future, I think that the administration better be very careful with what it proposes, and I would hope that they would check with our committee before they get too far toward making it public.

[Mr. Horton's prepared statement follows:]

CONGRESSMAN FRANK HORTON
29TH DISTRICT, NEW YORK

MR, CHAIRMAN, I FIND MYSELF IN A DIFFICULT POSITION THIS MORNING.

AN ADMINISTRATION HEADED BY A PRESIDENT OF MY OWN POLITICAL PARTY HAS ISSUED A PROPOSED REGULATION WHICH IS UNDER REVIEW BY MY COMMITTEE. I WANT TO SUPPORT MY ADMINISTRATION. I GENERALLY AGREE WITH THEM. ALL OTHER THINGS BEING EQUAL, I WOULD SUPPORT THEM EVEN IF I WERE NOT OVERLY ENTHUSIASTIC ABOUT ONE OF THEIR PROPOSALS.

BUT MUCH AS I WOULD LIKE TO BE ABLE TO DEFEND THE ADMINISTRATION, ON THIS ISSUE I CANNOT.

I SUPPORT THE PRINCIPLE THAT PRIVATE GROUPS SHOULD NOT USE GOVERNMENT FUNDS TO LOBBY THEIR GOVERNMENT. GOVERNMENT AGENCIES SHOULD NOT AWARD GRANTS AND CONTRACTS TO HIGHLY IDEOLOGICAL ORGANIZATIONS WHICH USE THOSE AWARDS TO FURTHER THEIR OWN POLITICAL AIMS.

BUT MR, CHAIRMAN, THE PROPOSED REGULATION BEFORE US THIS MORNING IN ADDRESSING THESE CONCERNS GOES BEYOND THE BOUNDS OF PROPRIETY. IT SAYS TO CITIZENS THAT IF THEIR SALARY IS A RESULT OF A GOVERNMENT CONTRACT OR GRANT THEY CANNOT COMMENT DURING WORKING HOURS ON GOVERNMENT ACTIVITY. THEY MAY NOT COMMUNICATE WITH LEGISLATORS OR EXECUTIVE BRANCH POLICY-MAKERS. THEY MAY NOT EVEN, IN THE NORMAL COURSE OF BUSINESS, TO QUOTE ITEM (B)(3) OF THE PROPOSAL, "ATTEMPT TO INFLUENCE GOVERNMENTAL DECISIONS THROUGH AN ATTEMPT TO AFFECT THE OPINIONS OF THE GENERAL PUBLIC OR ANY SEGMENT THEREOF." AS A LEGISLATOR CONCERNED WITH THE PROPER OPERATION OF ALL GOVERNMENT ACTIVITIES, I AM STRONGLY OPPOSED TO ANY REGULATION THAT WOULD LIMIT THE OPPORTUNITIES OF CITIZENS WORKING ON GOVERNMENT GRANTS AND CONTRACTS FROM TALKING WITH ME ABOUT THEIR WORK.

THIS PROPOSAL, HOWEVER, DOES NOT STOP HERE. THE REGULATION WOULD ALSO APPLY TO ALL CITIZENS IF ANY PART OF THEIR SALARY -- NO MATTER HOW SMALL -- WAS PAID FROM A FEDERAL AWARD. TO THESE PEOPLE THIS REGULATION SAYS NO MATTER HOW MUCH MAY YOU MAKE PRIVATELY IF ANY PART OF YOUR SALARY COMES FROM A FEDERAL CONTRACT OR GRANT, YOU MAY NOT "ATTEMPT TO AFFECT THE OPINIONS OF (ANY SEGMENT OF) THE GENERAL PUBLIC" -- ANY OTHER PERSON, THAT IS -- WITH REGARD TO ANY "GOVERNMENTAL DECISION." WE'RE NOT TALKING HERE ABOUT WHAT EXPENSES CAN LEGITIMATELY BE CLAIMED AS REIMBURSABLE UNDER AN AWARD, OR EVEN WHAT CAN BE TAX-DEDUCTIBLE. WE'RE TALKING ABOUT WHAT A CITIZEN CAN DO WITH HIS OWN MONEY, ON TIME NOT PAID FOR BY THE GOVERNMENT, IF ANY PORTION OF HIS SALARY COMES FROM A COST-BASED GOVERNMENT GRANT OR CONTRACT. THE PROPOSAL DOESN'T SAY THAT HE CAN'T USE HIS OWN MONEY TO EXPRESS AN OPINION ABOUT A PUBLIC ISSUE. IT SAYS THAT IF HE RECEIVES ANY GOVERNMENT MONEY THROUGH AN AWARD BASED ON COST, HE CANNOT EXPRESS AN OPINION ON PUBLIC MATTERS AND STILL BE COMPENSATED.

MR. CHAIRMAN, THAT IS POSITIVELY OUTRAGEOUS. I CANNOT BELIEVE THAT THIS COULD POSSIBLY BE THE INTENT OF THE ADMINISTRATION -- YET THE LANGUAGE IS PAINFULLY CLEAR.

WE ALL KNOW THAT A GOVERNMENT AWARD IS A PRIVILEGE, NOT A RIGHT, AND THAT THE GOVERNMENT MAY THEREFORE PLACE CERTAIN CONDITIONS ON ITS RECIPIENTS. WE MAY ARGUE ABOUT WHICH CONDITIONS ARE APPROPRIATE IN WHICH CASES. BUT ALL AMERICANS MUST STAND TOGETHER IN CONDEMNING ANY ATTEMPT TO FORBID ANYONE WHO ACCEPTS ANY FEDERAL MONEY FROM USING HIS OWN RESOURCES TO SPEAK HIS MIND ON PUBLIC ISSUES.

IF WE PERMIT THIS RESTRICTION ON RECIPIENTS OF COST-BASED AWARDS, WHERE WILL THE LIMITATIONS STOP? MIGHT THEY BE EXTENDED TO ABRIDGEMENTS OF OTHER CONSTITUTIONAL RIGHTS? COULD ANYONE WHO TAKES FEDERAL MONEY BE REQUIRED TO ATTEND A CERTAIN CHURCH? GIVE UP HIS SECURITY AGAINST

UNREASONABLE SEARCH AND SEIZURE? LOSE HIS VOTE? MIGHT THE RESTRICTIONS EXTEND TO OTHER CLASSES OF PEOPLE WHO RECEIVE FEDERAL FUNDS -- GOVERNMENT EMPLOYEES OR SOCIAL SECURITY BENEFICIARIES, FOR EXAMPLE? HOW ABOUT RECIPIENTS OF TAX BREAKS, LIKE HOMEOWNERS WHO DEDUCT THE INTEREST PAYMENTS ON THEIR MORTGAGES?

I DON'T BELIEVE IT IS THE INTENTION OF THIS ADMINISTRATION TO DO THE THINGS I'VE JUST MENTIONED, BUT THE POTENTIAL FOR MISCHIEF IS THERE. SOME PEOPLE MAY THINK THAT THIS POTENTIAL IS SMALL, AND THAT THESE QUESTIONS I'M POSING ARE EXTREME, BUT THE INSERTION IN THE APPROPRIATE PLACES OF A FEW SIMPLE WORDS COULD EXTEND THIS PROPOSAL TO ALMOST EVERY AMERICAN CITIZEN.

EVEN AS THE PROPOSAL IS DRAFTED, FIRST AMENDMENT LIBERTIES MAY NOT BE THE ONLY CONSTITUTIONAL RIGHTS WHICH ARE THREATENED. AS I HAVE DISCUSSED MY CONCERNS INFORMALLY WITH SOME OF MY FRIENDS -- PEOPLE WHO, IF THIS PROPOSAL WERE LAW, WOULD NO LONGER BE ABLE TO SPEAK WITH ME UNLESS THEY WERE PREPARED TO FORFEIT THEIR GOVERNMENT CONTRACTS -- I HAVE HEARD FEARS THAT THE FIFTH AMENDMENT RIGHT TO DUE PROCESS MAY ALSO BE AT RISK. SUPPOSE AN INDIVIDUAL HOLDS A GOVERNMENT CONTRACT TO WHICH HE DEVOTES X PERCENT OF HIS TIME, AND IS THEREFORE REIMBURSED FOR X PERCENT OF HIS SALARY. THE WORK IS PERFORMED SATISFACTORILY. WHILE IT IS UNDER WAY, HOWEVER, THIS PERSON, DURING A TIME WHEN HE IS WORKING ON SOMETHING OTHER THAN HIS GOVERNMENT CONTRACT, SPENDS HIS OWN MONEY TO COME TO CAPITOL HILL, SO THAT HE CAN SPEAK WITH ME ABOUT A PUBLIC ISSUE. HE HAS NOW VIOLATED THE TERMS OF HIS CONTRACT, SO HE LOSES THE ENTIRE SALARY REIMBURSEMENT HE HAD COMING TO HIM. THE GOVERNMENT HAS THUS TAKEN HIS LABORS WITHOUT PROVIDING HIM DUE PROCESS. SOUND REASONABLE? MOST CERTAINLY NOT. I WOULD HATE TO BE REPRESENTING THE GOVERNMENT WHEN THE INDIVIDUAL BRINGS THIS CASE TO COURT.

MR. CHAIRMAN, THESE CONSTITUTIONAL PROBLEMS ARE NOT THE ONLY DIFFICULTIES I HAVE WITH THIS PROPOSAL. I WANT TO RAISE A COUPLE OF OTHER CONCERNS, AS WELL. IT'S ALWAYS FASHIONABLE TO DUMP ON LOBBYISTS. AS A SOCIAL GROUP, THEY ARE GENERALLY HELD IN LOW ESTEEM. BUT YOU AND I KNOW VERY WELL FROM OUR YEARS IN THE CONGRESS THAT LOBBYISTS PERFORM A VERY VALUABLE FUNCTION BY MAKING US AWARE OF THE CONCERNS OF PEOPLE WHO ARE INTERESTED IN THE MAKING OF PUBLIC POLICY. THEY PROVIDE IDEAS; THEY HELP US EVALUATE THOUGHTS OF OUR OWN; THEY AID IN DRAFTING DOCUMENTS SO THAT THOSE STATEMENTS ARE TECHNICALLY CORRECT AND HAVE AS FEW UNFORESEEN CONSEQUENCES AS POSSIBLE; AND THEY GIVE US AN IMPRESSION OF HOW DIFFERENT GROUPS IN SOCIETY WILL VIEW OUR WORK. THEY DON'T DO THIS ONLY FOR THE CONGRESS, EITHER; THEY PROVIDE ALL THE SAME SERVICES FOR AGENCIES AND OFFICIALS OF THE EXECUTIVE BRANCH. THIS ADMINISTRATION KNOWS THAT, TOO; TO CITE ONE WELL-KNOWN EXAMPLE, THE PRESIDENT HAS CREATED THE GRACE COMMISSION, COMPOSED OF PRIVATE-SECTOR REPRESENTATIVES, TO ADVISE ON HOW TO MANAGE FEDERAL PROGRAMS BETTER.

YOU AND I KNOW THAT PEOPLE WHO ADVISE US WILL OCCASIONALLY PROVIDE INFORMATION THAT IS BIASED OR EVEN INCORRECT. BUT IF WE COULDN'T EVALUATE THEIR ARGUMENTS AND DRAW OUR OWN CONCLUSIONS ON PUBLIC ISSUES, WE WOULDN'T BE WORTH OUR SALT AS CONGRESSMEN. IT'S OUR JOB TO DISTILL FROM THE OFTEN CONFLICTING ASSERTIONS OF PUBLIC DEBATE WHAT THE BEST POLICIES ARE. BUT WE WOULD SURE HAVE A TOUGH TIME FIGURING OUT HOW TO PROCEED IF THAT DEBATE WERE STILLED. LOBBYISTS AND OTHER CITIZENS WHO PETITION THEIR GOVERNMENT OFFICIALS PROVIDE THE INFORMATION THAT ENABLES US TO MAKE FAR MORE INFORMED AND INTELLIGENT DECISIONS.

I AM LASTLY DISTURBED, MR. CHAIRMAN, BY THE NAIVETÉ WHICH CHARACTERIZES THIS PROPOSAL'S UNDERSTANDING OF THE RELATIONSHIP BETWEEN BUSINESS AND GOVERNMENT. WE HEAR THAT THERE SHOULD BE A "WALL OF SEPARATION" BETWEEN COMMERCIAL AND POLITICAL ACTIVITY. BUT OUR ECONOMY

AND OUR GOVERNMENT OPERATE IN SUCH A WAY THAT ONE CANNOT BE SEPARATED FROM THE OTHER. FOR BUSINESS TO FUNCTION EFFECTIVELY IN TODAY'S ECONOMY, IT MUST PARTICIPATE IN GOVERNMENTAL DECISIONS. TAX AND OTHER LAWS RECOGNIZE THAT SOME POLITICAL ACTIVITY CONSTITUTES COSTS NECESSARY TO THE USUAL CONDUCT OF BUSINESS. FOR GOVERNMENT TO FUNCTION EFFECTIVELY, IT MUST DEPEND ON MANY AND VARIED TYPES OF ASSISTANCE FROM BUSINESS. THIS MUTUAL DEPENDENCE BY ITSELF MAKES CREATING A "WALL OF SEPARATION" IMPOSSIBLE.

THE PRACTICAL APPLICATIONS OF CREATING A WALL ARE PERPLEXING, TOO. UNDER THE PROPOSAL, FOR EXAMPLE, MARKETING IS A LEGITIMATE BUSINESS EXPENSE, BUT LOBBYING IS SUFFICIENT GROUNDS FOR DISQUALIFYING ALL REIMBURSEMENT FOR COSTS ASSOCIATED WITH A PERSON WHO DOES IT. WHAT IS THE PRACTICAL DIFFERENCE BETWEEN MARKETING AND LOBBYING? MARKETING IS A COMPLEX AND MULTI-FACETED ACTIVITY IN ANY AREA. IT IS PARTICULARLY COMPLICATED WHEN GOVERNMENT IS INVOLVED. MARKETING HERE INVOLVES SPEAKING WITH A MYRIAD OF INDIVIDUALS IN VARIOUS AGENCIES AND TWO SEPARATE BRANCHES OF GOVERNMENT. IT FREQUENTLY REQUIRES INFLUENCING POLICY-MAKERS AS WELL AS CONTRACTING OFFICERS. THE LINE BETWEEN MARKETING AND LOBBYING CANNOT BE DRAWN WITH ANY DEGREE OF CORRECTNESS.

IN SUMMARY, MR. CHAIRMAN, THIS PROPOSAL IS A CLASSIC EXAMPLE OF THE REMEDY BEING WORSE THAN THE PROBLEM IT IS SUPPOSED TO SOLVE -- IT'S LIKE BURNING YOUR HOUSE DOWN BECAUSE YOU DON'T LIKE THE COLOR OF THE WALLPAPER.

I AM TRULY SORRY TO HAVE TO SPEAK IN SUCH HARSH TERMS ABOUT A PROPOSAL ADVANCED BY THE ADMINISTRATION. BUT I WOULD NOT BE FULFILLING MY DUTIES AS A MEMBER OF CONGRESS IF I DID NOT VOICE THESE OPINIONS.

I UNDERSTAND THAT THE ADMINISTRATION IS NOT YET PREPARED TO ISSUE THESE PROPOSED REGULATIONS IN FINAL FORM. I AM HOPEFUL THAT IN TODAY'S HEARING WE CAN EXPLORE WAYS TO ADDRESS THE ISSUES I HAVE RAISED AND AT THE SAME TIME ADDRESS THE CONCERNS THAT HAVE PROMPTED THE ADMINISTRATION TO ACT -- THE PROBLEM OF PRIVATE GROUPS INAPPROPRIATELY USING PUBLIC MONIES TO LOBBY GOVERNMENT.

Mr. BROOKS. Thank you very much, Mr. Horton.

The first witness this morning is Congressman Mel Levine from California's 27th District. He was elected to the 98th Congress in November, after 6 years in the California Assembly. He has a bachelor's from the University of California at Berkeley, a master's in public administration from Princeton, and a law degree from Harvard. He serves on our Government Operations Subcommittees on Environment, Energy, and Natural Resources, and on Manpower and Housing. We welcome you as a witness today.

**STATEMENT OF HON. MEL LEVINE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. LEVINE. Thank you very much, Mr. Chairman.

I very much appreciate the opportunity to testify before your subcommittee today.

In light of the excellent remarks made both by you, Mr. Chairman, and by your ranking minority colleague, I would like to have the opportunity to summarize my testimony for you and seek unanimous consent to revise and extend my remarks by submitting the full testimony into the record.

Mr. BROOKS. Without objection.

Mr. LEVINE. Thank you, Mr. Chairman.

Over the last few weeks, I have received a number of letters and telephone calls from concerned business leaders in my district regarding the proposed OMB revision to existing guidelines on lobbying and political advocacy known as Circular A-122.

I asked to be here today to relay some of that concern to you, which has come from a cross-section of my district, and to other members of your subcommittee.

I want to begin by saying that I agree with both the chairman and Mr. Horton that the intent of the revision is appropriate and that some reform of current guidelines is long overdue. In none of my conversations with people who oppose the reforms currently under consideration has anyone questioned the need to insure that no one who receives Government grants be allowed to use that money for partisan political purposes. Unfortunately, the revised guidelines go beyond their stated goal and might very well significantly impair the flow of information Members of Congress need to properly represent their constituents.

I am concerned also that these regulations appear to go so far as to significantly impair the first amendment rights of people covered by these regulations. Objections to the new guidelines that have been provided to me by people throughout my district focus on three areas. First the prohibition against "attempting to influence governmental decisions through an attempt to affect the opinion of the general public or any segment thereof" appears to be quite unreasonably broad. It is so broad in fact that it could be construed to cover conversations between individuals and elected officials. Does this mean that if I am touring an installation at which contract employees are working on a Federal project and I ask an employee for his opinion on the value of the project that that employee could find himself or herself in trouble for sharing his or her opinions with me? Would an employee of a nonprofit organiza-

tion be prohibited from meeting with me to discuss the merits of a project in which that organization was involved during regular business hours? Would covered individuals be prohibited from writing something as insignificant as a letter to the editor clarifying an issue discussed in that publication's editorial or news section?

In reading the OMB circular, Mr. Chairman, it appears that the answers to those questions would all be yes. I believe that such prohibitions are not only unfair, but violate free speech guarantees contained in the first amendment to our Constitution.

Other specific provisions are equally disturbing. Subsection 1.b.(4) of the new paragraph would appear to be designed to prohibit covered individuals from taking part in lobbying both elected officials and their staffs.

Subsection 1.b.(6) prohibits giving anything of value, including membership dues to any organization with political advocacy "as a substantial organization purpose." The legitimate objections that have been raised by so many people to these vague, overbroad, and suspect provisions range from the implications for advocacy, membership, and simple provision of information.

Many times supporters and opponents of legislation or guidelines can be an indication of how well crafted such guidelines are. And as you indicated, Mr. Chairman, anything which manages to generate opposition from the chamber of commerce, the National Association of Manufacturers, Common Cause and the Girl Scouts of America clearly raises some very serious problems.

It is my belief that OMB would best be served by throwing away A-122 altogether and starting all over again to bring about some meaningful reform in this area. After reading the circular, it is my belief that it has so many problems that it would be much more work to try and fix this circular than to begin anew and do it right the first time.

Thank you again for allowing me to come before your subcommittee to express these concerns.

Mr. Brooks. Thank you very much. We appreciate your testimony, Congressman.

[Mr. Levine's prepared statement follows:]

TESTIMONY OF CONGRESSMAN MEL LEVINE
BEFORE THE GOVERNMENT OPERATIONS
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

Over the last few weeks I have received a number of letters and telephone calls from concerned business leaders in my district regarding the proposed OMB revision to existing guidelines on lobbying and political advocacy, circular A-122. I asked to be here today to relay some of that concern to you and to other Members of your subcommittee.

I want to begin by saying that I believe that the intent of the revision is admirable and that some reform of current guidelines is long overdue. In none of my conversations with people who oppose the reforms currently under consideration has anyone questioned the need to ensure that no one who receives government grants be allowed to use that money for partisan political purposes. Unfortunately, the revised guidelines go beyond their stated goal and might very well significantly impair the flow of information Members of Congress need to properly represent their constituents. I am concerned, also, that these regulations may go so far as to significantly impair the First Amendment rights of people covered by these regulations.

Objections to the new guidelines are focused on three areas:

(1) The prohibition against "attempting to influence governmental decisions through an attempt to affect the opinion of the general public or any segment thereof," seems unreasonably broad. It is so broad, in fact, that it could be construed to cover conversations between individuals and elected officials. Does this mean that if I am touring an installation at which contract employees are working on a federal project and I ask an employee for his opinion on the value of the project, that he could find

himself in trouble for sharing his opinion with me? Would an employee of a non-profit organization be prohibited from meeting with me to discuss the merits of a project in which that organization was involved during regular business hours? Would covered individuals be prohibited from writing something as insignificant as a letter to the editor clarifying an issue discussed in that publication's editorial or news section?

In reading the OMB circular, it appears that the answers to these questions would be in the affirmative. I believe that such prohibitions are not only unfair, but tread dangerously close to violating freedom of speech guarantees contained in the Constitution.

(2) Secondly, subsection 1.b.(4) of the new paragraph B33 would appear to be designed to prohibit covered individuals from taking part in lobbying both elected officials and their staffs. Once again, however, the guidelines are written in such a general manner that all communication between elected officials, government employees and their staffs would be prohibited. Frankly, it is very important that my staff and I have the ability to communicate with knowledgeable individuals on subjects in which I am, or may become, involved as a result of my Congressional responsibilities. Any prohibition on this will impair my abilities to properly represent the needs of my constituents and will unfairly restrict their access to both me and members of my staff.

(3) Finally, subsection 1.b.(6) of the new paragraph B33 prohibits giving anything of value, including membership dues, to an organization with political advocacy "as a substantial organization purpose." Once again, because of the vague way in which these guidelines have been drafted, a worthwhile goal has been approached in a way which is so broad that in addition to prohibiting misuse of government funds, individuals and organizations would have their ability to participate in a broad cross-section of important activities impaired. For example, would a Chamber

of Commerce which spends a significant amount of its time advocating a particular point of view to either the public or elected officials be defined as a political organization? If it is, would both individuals and corporations which receive government grant funds be prohibited from joining that Chamber of Commerce? It would appear to me that they almost certainly would.

These objections merely scratch the surface of the complaints which I have received about this matter. Many times supporters and opponents of legislation or guidelines can be an indication of how well crafted such guidelines are. Anything which manages to generate opposition from the Chamber of Commerce, the National Association of Manufacturers, Common Cause and the Girl Scouts of America clearly raises some very serious problems. It is my belief that OMB would best be served by throwing away A-122 and starting all over again to bring about some meaningful reform to this area. After reading the circular, it is my belief that it has so many problems that it would be much more work to try and fix this circular than to start all over again and do it right the first time.

Thank you again for allowing me to come before you and convey to you my concerns.

Mr. BROOKS. Our next witness this morning is Congressman Ed Towns of New York's 11th District. He was elected to the 98th Congress from the district which constitutes a large portion of Brooklyn. He is a social worker by profession and served for 5 years as the deputy borough president for Brooklyn. On Government Operations, Congressman Towns serves on our Subcommittees on Government Information, Justice, and Agriculture, and on Intergovernmental Relations and Human Resources.

Congressman, we are delighted to have you here. You may proceed.

STATEMENT OF HON. EDOLPHUS TOWNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Towns. I am delighted to be here, Mr. Chairman.

In light of what Congressman Horton has said, and in light of your comments, Mr. Chairman, I will just summarize. I am happy to know that A-122 is not going to be moved forward.

Mr. BROOKS. Without objection, the statement of the gentleman will be included in the record and you can proceed as you see fit.

Mr. Towns. A couple of comments. As legislators, we have a responsibility to insure that Congress retains the power to make law and not the executive branch agencies. Regulations are no substitute for legislation. OMB's new rules clearly move beyond congressional intent in restricting the use of Federal grants by nonprofit organizations. They also infringe on the constitutional protection rights of freedom of speech. Such restrictions must be actively opposed by Congress. Hopefully, today's hearings will serve to expose these rules as bad public policy and will lead to their withdrawal as it has already done.

I am thankful for this opportunity to present my views to the committee and hope that we will make certain that rules such as A-122 never move forward, because I think it is important to encourage people to participate in the governmental process.

Thank you very much, Mr. Chairman.

Mr. BROOKS. Thank you very much.

Mr. HORTON. Mr. Chairman, I would just like to welcome Congressman Towns. Ed is a new member of the New York delegation and we in that delegation are very happy that you are on this committee. It is the first time you have testified before the committee. I have read your statement and I certainly agree with it.

Mr. Towns. Delighted to be working with you.

Mr. BROOKS. Thank you very much.

[Mr. Towns' prepared statement follows:]

TESTIMONY
OF
THE HONORABLE ED TOWNS

MR. CHAIRMAN, I WISH TO COMMEND YOU FOR HOLDING THESE HEARINGS ON OMB'S PROPOSED AMENDMENTS TO ITS "COST PRINCIPLES FOR NON-PROFIT ORGANIZATIONS", OMB CIRCULAR A-122. I BELIEVE THAT THESE HEARINGS ARE CRITICAL TO MAINTAINING OUR "CHECKS AND BALANCES" SYSTEM OF GOVERNMENT. THE "SO-CALLED MANDATE" OF 1980 DID NOT GIVE THE ADMINISTRATION LICENSE TO BECOME A MONARCHY, WITH NO ROLE FOR THE LEGISLATIVE OR JUDICIAL BRANCHES OF OUR GOVERNMENT. UNFORTUNATELY, THIS ADMINISTRATION, IN A NUMBER OF AREAS, HAS BEHAVED AS IF EXECUTIVE BRANCH EDICTS WERE OMNIPOTENT. OMB'S AMENDMENTS, TO CIRCULAR A-122, ARE ONLY THE LATEST EXAMPLE OF SUCH ABUSE.

MANY FEDERAL GRANTS AND CONTRACTS PROVIDE THAT THE GOVERNMENT WILL REIMBURSE THE GRANTEE OR CONTRACTOR FOR EXPENSES RELATED TO THE GRANT OR CONTRACT ACTIVITY. SINCE GRANTEES USUALLY ENGAGE IN OTHER ACTIVITIES, NOT FUNDED BY A FEDERAL GRANT OR CONTACT, THE TOTAL COST OF THE GRANTEE'S OPERATIONS MUST BE ALLOCATED BETWEEN THE GRANT ACTIVITY AND THE OTHER ACTIVITIES OF THE GRANTEE. OMB HAS A LEGITIMATE ROLE IN ESTABLISHING UNIFORM GUIDELINES FOR MAKING THIS "COST ALLOCATION" TO NON-PROFIT GRANTEES. THE PROPOSED CHANGES TO THE CURRENT GUIDELINES, HOWEVER, GO FAR BEYOND OMB'S APPROPRIATE ROLE IN DETERMINING COST ALLOCATIONS. IN FACT, OMB'S NEW GUIDELINES ARE MORE RESTRICTIVE THAN CONGRESS' OWN LEGISLATIVE MANDATES AND STATUTES.

UNDER THE PROPOSED AMENDMENTS, ALL GRANTS TO NON-PROFIT ORGANIZATIONS WOULD BE SUBJECT TO RESTRICTIONS ON PARTICIPATION IN THE GOVERNMENTAL DECISION-MAKING PROCESS. CURRENTLY, SUCH RESTRICTIONS APPLY ONLY WHERE EXPLICITLY IMPOSED BY CONGRESS. NOT ONLY WOULD THESE AMENDMENTS DENY REIMBURSEMENT FOR THE COSTS OF "POLITICAL ADVOCACY" BUT THE DEFINITION OF "POLITICAL ADVOCACY" HAS BEEN EXPANDED SIGNIFICANTLY. INFLUENCING GOVERNMENTAL DECISIONS THROUGH COMMENTS ON REGULATIONS, AMICUS BRIEFS, PUBLIC INTEREST LITIGATION OR ANY COMMUNICATION DESIGNED TO

INFLUENCE A GOVERNMENT EMPLOYEE IN MAKING OR ADMINISTERING PUBLIC POLICY IS PROHIBITED BY THE PROPOSED OMB REGULATIONS. THESE RESTRICTIONS ARE GREATER THAN THOSE IMPOSED ON CHARITABLE 501(c)3 ORGANIZATIONS BY THE INTERNAL REVENUE CODE OR THE RESTRICTIONS CONGRESS HAS ATTACHED TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' APPROPRIATIONS BILL. PERHAPS THE MOST ONEROUS CHANGE, IN THE COST ALLOCATION RULES, INVOLVES A RESTRICTION ON NON-FEDERALLY FUNDED ACTIVITIES. CURRENT LIMITATIONS ON LOBBYING EFFORTS GENERALLY APPLY ONLY TO ACTIVITIES DIRECTLY SUPPORTED BY GRANT FUNDS. OMB WOULD CHANGE THESE RESTRICTIONS TO INCLUDE NON-FEDERAL FUNDS. FOR EXAMPLE, IF AN EMPLOYEE'S SALARY WAS SUPPORTED ENTIRELY BY FEDERAL FUNDS AND HE OR SHE SPENT AS LITTLE AS 10 PERCENT OF HIS OR HER TIME ON "POLITICAL ADVOCACY", THE NEW RULES WOULD PROHIBIT REIMBURSEMENT OF ANY PART OF THE EMPLOYEE'S SALARY--NOT JUST THE 10 PERCENT. EVEN WHERE THE EMPLOYEE'S SALARY IS PAID PARTIALLY WITH NON-FEDERAL FUNDS, IF THE EMPLOYEE SPENDS ANY TIME ON "POLITICAL ADVOCACY", NO PART OF HIS OR HER SALARY CAN BE REIMBURSED UNDER THE FEDERAL GRANT.

IN THESE PROPOSED RULE CHANGES, OMB HAS EXCEEDED ITS "POWER TO ADOPT REGULATIONS TO CARRY INTO EFFECT THE WILL OF CONGRESS AS EXPRESSED BY STATUE". IN GENERAL, NO LEGISLATION RESTRICTS THE RIGHT OF NON-PROFIT ORGANIZATIONS RECEIVING FEDERAL GRANTS OR CONTRACTS TO LOBBY OR OTHERWISE PARTICIPATE IN THE GOVERNMENTAL DECISION-MAKING PROCESS. IN FACT, WHERE CONGRESS HAS SUPPORTED CERTAIN RESTRICTIONS ON LOBBYING, THEY HAVE NEVER BEEN AS SEVERE AS THOSE PROPOSED BY OMB. FOR EXAMPLE, THE HEAD-START ACT, WHILE PROHIBITIING VOTER REGISTRATION AND OTHER POLITICAL ACTIVITIES, SPECIFICALLY LIMITS THIS PROHIBITION ONLY TO "THAT PORTION OF THEIR EMPLOYEES TIME FOR WHICH THEY RECEIVE COMPENSATION PROVIDED DIRECTLY OR INDIRECTLY UNDER THE AUTHORITY OF THE ACT".

IN ADDITION, THE PROPOSED RULE, DENYING GRANTEES REIMBURSEMENT FOR THE COST OF ENTIRELY PROPER, NON-POLITICAL GRANT ACTIVITIES IF THEY EXERCISE THEIR FIRST AMENDMENT RIGHT OF EXPRESSION, RAISES STRONG CONSTITUTIONAL QUESTIONS. LIMITING "FREEDOM OF SPEECH", BY THE THREAT OF A LOSS OF GOVERNMENT GRANTS OR CONTRACTS, SERVES NO COMPELLING GOVERNMENT INTEREST, EXCEPT TO ELIMINATE CRITICISM. GOVERNMENT-LED EFFORTS TO STIFLE CRITICISM HAVE NO PLACE IN A DEMOCRATIC SOCIETY. NO ONE DENIES THAT LIBERAL, NON-PROFIT GROUPS WILL BEAR THE BRUNT OF THESE NEW RULES. MOST CERTAINLY, THE ADMINISTRATION IS AWARE OF THIS REALITY AND IN FACT, "DEFUNDING THE LEFT" IS PROBABLY ONE OF THE MAJOR POLITICAL RATIONALES BEHIND THESE PROPOSED RULE CHANGES. GROUPS, UNWILLING TO FORFEIT THEIR FIRST AMENDMENT RIGHTS, WILL CEASE TO PARTICIPATE IN FEDERALLY-FUNDED PROGRAMS AND IT WILL NOT BE "THE LEFT" OR LIBERAL GROUPS WHO ARE THE REAL LOSERS BUT THE MILLIONS OF AMERICANS WHO ARE SERVED BY THESE PROGRAMS. THOUSANDS OF GOVERNMENT PROGRAMS AND SERVICES ARE NOW ADMINISTERED THROUGH NON-PROFIT ORGANIZATIONS. SHELTERED WORKSHOPS, JOB TRAINING PROGRAMS, HOME-CARE SERVICES FOR THE ELDERLY AND MANY OTHER ACTIVITIES COULD NOT FUNCTION WITHOUT THE INVOLVEMENT OF NON-PROFIT ORGANIZATIONS.

AS LEGISLATORS, WE HAVE A RESPONSIBILITY TO ENSURE THAT CONGRESS RETAINS "THE POWER TO MAKE LAW" AND NOT THE EXECUTIVE BRANCH AGENCIES. REGULATIONS ARE NO SUBSTITUTE FOR LEGISLATION. OMB'S NEW RULES CLEARLY MOVE BEYOND CONGRESSIONAL INTENT IN RESTRICTING THE USE OF FEDERAL GRANTS BY NON-PROFIT ORGANIZATIONS. THEY ALSO INFRINGE ON CONSTITUTIONALLY-PROTECTED RIGHTS OF "FREEDOM OF SPEECH". SUCH RESTRICTIONS MUST BE ACTIVELY OPPOSED BY CONGRESS. HOPEFULLY, TODAY'S HEARING WILL SERVE TO EXPOSE THESE RULES AS BAD PUBLIC POLICY AND WILL LEAD TO THEIR WITHDRAWAL.

I AM THANKFUL FOR THIS OPPORTUNITY TO PRESENT MY VIEWS TO THE COMMITTEE ON THIS IMPORTANT MATTER.

Mr. BROOKS. Our next witness this morning is Congresswoman Pat Schroeder from Colorado's 1st District. She was elected to the 93d Congress in 1972, and in the past 10 years she has compiled a distinguished record both in her service on the Armed Services Committee and on the Post Office and Civil Service Committee where she is chairwoman of the Subcommittee on Civil Service.

She is a Phi Beta Kappa graduate of the University of Minnesota and has a law degree from Harvard University.

Pat, we look forward to hearing you this morning.

STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mrs. SCHROEDER. Thank you very much, Mr. Chairman. I too would like to ask unanimous consent to put my statement in the record and just summarize.

Mr. BROOKS. Without objection.

Mrs. SCHROEDER. I want to say that I can't salute the chairman enough for having the tenacity to move forward and protect free speech and the right to petition. I think that is what they forgot when they drafted this regulation. The chairman has always been very, very good about not being bulldozed by anybody. I thank you for moving forward and making sure this is aired, rather than deciding that we could just put it away and hope the next regulation won't be so oppressive.

What is so disconcerting to me about all of this is that if you look at this and put it together with the regulations about the Combined Federal Campaign that came out at the same time, they really have gone way, way too far. Other people have said that but let us talk about how in the world could you hold yourself out as a group trying to serve Vietnam veterans, for example, if you can't testify on disability coverage for agent orange. You couldn't.

How could you possibly be out working to shelter the homeless, going out to get funds for the shelters and not be allowed to come down here and tell Members of Congress what will happen if they shut off the funds for the shelters. They will be right back with the homeless, back on the street. You can't do that.

If these groups are out really trying to serve segments of our society whether they are Native Americans, or blind people, or Vietnam veterans, or the homeless, what have you, they have a duty to be an advocate. And being an advocate is not necessarily being a lobbyist. I think we have to go way back to the drawing board and start all over again. The way I read this regulation if one phone call was made on an organization's telephone, it wouldn't be allowed to pay for any part of that phone bill with any kind of Government money. If one letter was written by one staff member, no money could go to that staff person's salary. As I said drawing the line between legitimate advocacy and lobbying is very difficult. I do not believe it can be done. I do believe what you are doing here is really making a political statement. If you are saying you are only going to honor the organizations that won't attack anything the Government does, what you said is you really want a bunch of lap dogs. These organizations were out there to be advocates to protect their people, not to protect the Government.

So what you are doing is forcing these advocacy agencies to become protectors of the Government. They are not supposed to tell us what they are doing. They are not supposed to tell them how we flub up.

So I think that's what really this regulation is saying. It is a silencing of criticism. It is very critical under the first amendment.

If I look at these regulations and also look at the Combined Federal Campaign regulations and also look at legislation we will be taking up this week, some very interesting things happen. As you know in the appropriations bill this week, we will be putting \$50 million out for the homeless. We will be giving it to private organizations to try and channel it out for the homeless because we figured that they knew how to do it best.

Now, I think, the way I read the CFC regulations and the way I read OMB A-122 circular, those organizations will never be allowed to participate in the Combined Federal Campaign or get Government grants again because the United Way and the Red Cross and so forth came here, talked to Members of Congress, said we are in the business of providing this kind of shelter, we know what to do; Members of Congress said terrific, we will give the money directly to you. I think that would be considered lobbying and advocacy under the CFC rules or Circular A-122.

So next year they may find themselves not in the Combined Federal Campaign and if they are operating under A-122, which we now hear is going to be pulled, they will be in great trouble there.

So this really goes way too far. I don't think we can go around and just prefer advocates that don't advocate, and that is really what we are saying if this thing goes through. I really salute the chairman and this committee for bringing it to the attention of the Office of Management and Budget that once again their vendetta may have gone much too far, that no one has any problem with real reform, but it can't go that far out of line and I really compliment you for getting right to it.

Mr. BROOKS. I want to thank you very much, Mrs. Schroeder. You are very gracious to come down and we appreciate your help.

[Mrs. Schroeder's prepared statement follows:]

STATEMENT OF REP. PATRICIA SCHROEDER
Before the Subcommittee on Legislation
and National Security, Committee on
Government Operations on

Chairman Brooks and members of the Subcommittee,

I am grateful for the opportunity to testify today about the Administration's manifest intolerance of political opposition and its recent efforts to suppress it. Chairman Brooks is to be commended for holding these hearings. I trust that his efforts to curb the excesses of political regulation proposed by this Administration will not end with today's session.

These hearings are primarily about a proposed revision of the Office of Management and Budget (OMB) Circular A-122, "Cost Principles for Nonprofit Organizations," to prohibit any government money from going to political advocacy. The revision of Circular A-122 brings with it revisions of Defense Department, National Aeronautics and Space Administration, and General Services Administration regulations dealing with procurement. These OMB regulatory changes come hand in hand with President Reagan's February 10, 1983, revision of the Executive order dealing with the Combined Federal Campaign. Taken altogether, these changes represent a concerted effort to defund anyone who is likely to disagree with the Administration. This attitude is summed up by a story I heard concerning the chief OMB drafter of the Circular A-122 revisions. He was asked about a large nonprofit organization which provides by contract, a substantial amount of high quality job training for the Federal government. The OMB official repudiatedly said, "They're great when they provide job training, but why do they have to go to the Hill to lobby against our budget cuts?"

The problem with the Circular A-122 revisions lies not in its basic policy, i.e., that government money should not go to subsidize political advocacy. This policy statement merely begs the questions. Obviously, tax dollars should not go to support directly the lobbying efforts of the Heritage Foundation or Americans for Democratic Action. Does this mean that contributions to these organizations

should not be tax deductible? The challenge is translating this principle into workable regulations governing the awarding of grants and contracts. The OMB proposal of January 24, 1983, makes no reasoned effort to balance First Amendment protection of citizens organizing to petition their government with the prohibition on government directly subsidizing advocacy. Rather, this proposal is extreme, unworkable and punitive. And, it is structured in a way guaranteed to hurt liberal organizations more than conservative ones, small businesses more than big businesses, and poor organizations more than rich ones. Others will go into the discriminatory effect of the regulations in greater detail. Suffice it to say that, while these regulations will impose new, high, and inflationary costs on everyone who does business with the government, it will not put General Dynamics or United Way out of business. It may very well price health, educational, and welfare organizations, as well as small businesses, out of the market. If one lobbying phone call is made on an organization's telephone, the regulations would prohibit the use of any government grant money to pay for any part of that phone bill. Where a staff member writes one letter to the local member of Congress, no portion of that staff member's salary can be supported by grant or contract funds. This is not sound contract management, as claimed by OMB; rather, this is political witchhunting.

The other piece of this attempt to defund political enemies comes in a new Executive order limiting participation in the Combined Federal Campaign (CFC) so that "agencies that seek to influence the outcome of elections or the determination of public policy through political activity or advocacy, lobbying or litigation on behalf of parties other than themselves shall not be eligible to participate in the Combined Federal Campaign." This statement is so broadly written that there is doubt whether traditional CFC recipients, such as United Way and American Cancer Society, can continue to participate. I do not know how the Office of Personnel Management can write regulations around this statement which will allow these organizations to participate. In announcing the new order, however, the Office of Personnel Management (OPM) said it was intended that "advocacy groups ... that

have been admitted to the CFC in recent years will be excluded from the campaign."

What I don't understand is how an organization dedicated to serving the needs of any group in need of special governmental assistance, say Vietnam veterans or blind people, or American Indians, or the homeless can do its job without becoming involved in legislative affairs. It strikes me as naive to say a group trying to help Vietnam veterans can provide direct counseling but cannot lobby for disability benefits for the victims of Agent Orange. It is silly to say that the Community for Creative Non-Violence can get money to shelter the homeless in Washington only so long as they do not lobby against budget cuts which will close shelters. The Appropriations bill, providing money for jobs, which we will vote on this week contains a section which provides \$50 million for food distribution and emergency shelters distributed by a board consisting, in part, of six non-profit organizations, including United Way of America, the Salvation Army, and the American Red Cross. Did this money for essential assistance to the homeless and hungry get in the bill by magic, or did the organizations which know the need the best convince members of the Appropriations Committee that there was a job to be done and they could do it? The latter is the case. Groups, like United Way, worked with the Congress to appropriate needed money. Yet, these organizations now may become ineligible for inclusion in the Combined Federal Campaign because they advocated appropriations for the homeless and hungry. Indeed, Circular A-122 could be construed to apply to the \$50 million contained in this legislation. If so, the groups' involvement in drafting the bill could render them ineligible to receive the money.

The First Amendment to the Constitution protects the right of citizens to organize and to petition the government for a redress of grievances. This Administration seems to view the First Amendment in the narrowest possible way: that the government can and should do whatever it can to stifle political discourse through withdrawing money from unquestionably non-political activities if the recipient spends any other money to engage in First Amendment protected activities.

So long as the government does not make it criminal to petition the government, the Reagan Administration believes that it is fine to withhold benefits from those who exercise this right. My own view of the First Amendment and the policy underlying it is that government should encourage and facilitate robust public discourse and sharp political debate. So long as the government does not prefer one advocate over another in terms of granting contracts or grants or in permitting them to participate in the Combined Federal Campaign, I see no reason to exclude advocacy groups from these programs. Rather, I believe the First Amendment tells us to allow such groups to participate. Indeed, looked at in another way, by only permitting the participation of non-advocacy groups, the government is, in fact, favoring one political position over another. It is favoring those who do not see fit to criticize the current Administration; it is favoring those who want to do what the Administration wants to do, i.e., preserve the status quo. This aspect is particularly troubling.

I urge this committee to tell the Office of Management and Budget to stop its political vendetta against those who oppose the policies of this Administration. Democracy cannot long tolerate a campaign of political vengeance, especially when it comes at the expense of the First Amendment.

Mr. BROOKS. Jim, do you want to make a statement right now? Come on and do that. We are delighted to hear at this time from Congressman Jim Moody, a distinguished new Member of Congress, interested in consumer affairs and dedicated to better government. We will be pleased to enter your prepared statement in the record.

**STATEMENT OF HON. JIM MOODY, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF WISCONSIN**

Mr. MOODY. Thank you, Mr. Chairman. Let me make this brief. A number of nonprofit organizations in Wisconsin met this weekend to express strong opposition to these proposed regulations. I want to make just two points.

First, I think these regulations are clearly a violation of the spirit with which this administration came into office. Namely, that we would rely on the nonprofit and voluntary organizations to provide the vitality to fill the void left by the administration's attitude that the private sector, and not the Government, should perform certain functions. It is therefore inappropriate that we now see this administration attempting to stifle that sector which is so important indeed. It is probably also unconstitutional under most interpretations.

My second point is that it is dysfunctional. It is dysfunctional to ask agencies that are out in front of the firing line helping to solve social problems to not communicate back to the Government what the problems are with current policies. After all, effective control of any organization or any activity requires a two-way communication. If you do not let the implementing organizations tell the Government what is wrong with a policy and how it should be changed, the corrective changes that are needed will not be made. It would be like setting a plane for a distant flight on automatic pilot and not allowing any adjustment in the navigational directions. So the regulations are not only in violation of the spirit of the voluntary approach to government that this administration touted, they are also dysfunctional and very counterproductive.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you very much, Congressman. We are delighted to have had you here.

[Mr. Moody's prepared statement follows:]

Congressman Jim Moody

Testimony before the

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

Committee on Government Operations

March 1, 1983

Mr. Chairman, members of the Subcommittee, I want to express my strong opposition to the Office of Management and Budget Circular A-122, the proposed amendments to its "Cost Principles for Nonprofit Organizations".

This proposal would so restrict the use of Federal funds for "political advocacy" or lobbying that nonprofit groups would be virtually prohibited from making any governmental contact whatsoever. Those affected include not only a large number of nonprofit organizations in my district, but a broad spectrum of groups from every part of the country, from Boeing aircraft to Planned Parenthood.

Under Circular A-122, the definition of "political advocacy" has been stretched to the point of being overly broad and vague --- thus raising serious constitutional questions. In fact under OMB's definition it is nearly impossible to distinguish true service work from advocacy. Since many of the activities undertaken by nonprofit groups require some communication with public officials, this definition only distorts those activities to the point of discouraging precisely what Congress originally intended to encourage.

The Reagan Administration has so broadly defined "political advocacy" that many organizations would forego all politically-related efforts rather than risk loss of federal monies. The definition embraces nearly any statement or action by any federal contractor or grantee that would have any effect on any political body. Even if groups are funded for the most part by private contributions, the fear of losing federal funds would have a "chilling effect" on speech, actions, publications and other contacts. If only 5% of an employee's time is spent on "advocacy", none of that employee's salary may be paid with federal funds. This is true even if these activities are necessary related to the purpose of the federal contract or grant. Finally, this definition places the

burden on the recipient of the funds to show that no "political advocacy" has taken place.

I am particularly concerned that the Circular will be fatal to smaller voluntary groups which depend upon federal grants or contracts for their very existence. Under the proposed OMB regulations these groups would need to hire a separate staff and conduct even remotely related activities from separate facilities--a situation which would be expensive and impractical at best, and in some cases, totally impossible.

In addition, this regulation creates an administrative nightmare for those who would have to enforce its sanctions. I know of no effective organization whose chief executive could or would disqualify him or herself from either the direct service side or the advocacy side. All channels of communications would have to be drastically altered. Can you imagine the head of either the Ford Motor Company or the Ford Foundation completely divorcing himself from any advocacy activity with government?

This regulation would in fact be dysfunctional. The free flow of information from implementing agency to government is vital if there are going to be necessary corrections and adjustments in programs. This feedback device and two-way information flow is an important and productive part of government purposes being carried out by non-government agencies, but Circular A-122 would make it become a tainted, almost immoral activity. To deny two-way communication would be like setting a plane on automatic pilot and not checking and rechecking during the flight to make sure the plane is still on course.

In conclusion, Mr. Chairman, I would like to say that the negative reaction in my district to this proposal has been strong and across the board. I have joined with a bipartisan group of my colleagues in sending a letter to the President expressing our concerns. Large and small groups representing every type of constituency, recognize the counter-productive nature of Circular A-122. Not only would the people who the nonprofit groups serve be sorely hurt but our government's ability to reshape and correct programs would be reduced.

For these reasons I am opposed to OMB's proposal and urge this subcommittee to send a strong and clear message to the White House and to the OMB.

Mr. BROOKS. Our next witness was supposed to have been Mr. David Stockman, Director of Office of Management and Budget. On February 16 I wrote a letter inviting him to appear before the subcommittee this morning to defend the OMB's proposal on cost principles for nonprofit organizations.

Apparently he preferred not to appear before this subcommittee and assumed that in his place he could send the Deputy Director of OMB Joe Wright, who is neither responsible for overall operation of the agency nor the author of this proposal. In several discussions last week between the committee staff and OMB officials, it was emphasized that the request was for Mr. Stockman to come down briefly and discuss the matter. But the determination of whose testimony is needed for us to carry on oversight and legislative responsibilities is ours to make, not the administration's. And OMB cannot simply assume that they can determine who they want to send.

Last night Joe Wright reached me at home and requested that he be substituted as the OMB witness. He was in California, flew in on the midnight express and he looks pretty good, considering that. He assured me that he is the person at OMB responsible for this area, and he can speak with the full authority of the agency. Apparently Mr. Stockman takes little interest in the management side of OMB, but concentrates his energies on the budget side. While I personally feel that the head of any agency should be fully responsible for all activities of the agency, I have agreed to have Mr. Wright testify. I told him last night to come on in as we would be delighted to have him.

But I just want the OMB to understand that we may call Mr. Stockman back sometime and when we do, we would hope that he could be here.

I would like to introduce Mr. Wright at this time. He was Deputy Secretary of Commerce, Assistant Secretary for Administration of the Department of Agriculture and Acting Assistant Secretary for Economic Affairs at the Department of Commerce. He has also held responsible positions in private industry in the area of management consulting and credit card retail marketing. He is accompanied by Bob Bedell, Deputy General Counsel of OMB. Did Mr. Michael Horowitz, the OMB Special Counsel, come down with you, Mr. Wright?

Mr. WRIGHT. No, sir, Mr. Chairman, he is not with us this morning.

Mr. BROOKS. The gentleman is recognized.

STATEMENT OF JOSEPH R. WRIGHT, JR., DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY BOB BEDELL, DEPUTY GENERAL COUNSEL

Mr. WRIGHT. Mr. Chairman, it sure is good to see you again.

Mr. BROOKS. Always a pleasure to have you, Joe.

Mr. WRIGHT. There is one advantage of taking the redeye from California and that is you get kind of numb when you come on in.

I sincerely am delighted to be here, because I think the process that we have gone through, like Congressman Horton said, on this issuance of changes to A-122, has been the tough way. We will be

issuing new draft regulations in a couple of weeks, going through the process all over again. But this did get us into a hearing before this distinguished group and my guess is that you are going to see some very honest opinions that are going to be stated by both sides of the aisle, both the business community, from the procurement as well as the nonprofits. And, Mr. Chairman, we feel like this is probably going to be very useful and we would like to concentrate on the need for some revisions to A-122 and do it in a very constructive manner.

I would like to submit my testimony for the record, if I may—

Mr. BROOKS. Without objection.

Mr. WRIGHT. Thank you. In there I include some of the Comptroller General's opinions on the subject, also the press release that we came up with last Friday stating our intent to go ahead and issue new draft regulations and delay the time for what will be in effect another 60 days from approximately right now.

The purpose of the proposed amendment to the OMB Circular A-122 is to make it clear that no appropriated funds are spent directly or indirectly to support lobbying or related activities. So far from both yourself, Mr. Chairman, Mr. Horton and the earlier witnesses, I have not heard a disagreement with that basic intent. So at least we are starting in the same direction.

I do agree that the first revisions went too far and there are some changes that are going to have to be made. The question that comes up continually is, why are these changes needed? Mr. Chairman, this is not an unusual precedent that we are setting in OMB in trying to better define cost principles. This is a third issuance of an OMB circular on trying to better define cost principles for Government agencies and cost principles apply whether they be procurement institutions, nonprofits and so forth.

The first one was Circular A-21, which came up in the late 1950's, which established the cost principles for educational institutions. The second one in the late 1960's was A-87, which established cost principles for State and local governments. Circular A-122 which came out in 1980 under the prior administration established the cost principles for nonprofit organizations.

Now, the problem that we found ourselves in is that the current rules are not necessarily clear, they are not uniform, and they are neither enforceable nor a deterrent toward using appropriated funds for lobbying. We believe that many of the decisions of the Comptroller General support our reading of the current law, and our assessment of some of the current problems. We are convinced that an effort to prohibit taxpayers' funds from being used to pay the costs of lobbyists is a worthwhile effort.

Now, the way to get that done should be really what we are working on today. So we are not coming out with a new A-122 that can be withdrawn like you suggested. That would be wrong because A-122 basically consists of definitions of cost principles that apply across a wide range of categories. What we are focusing on is the changes that would be made to put in better definitions of those costs that are used improperly for lobbying. And that is all. Not the rest of A-122.

The proposal that we came out with does two things. It clearly states that the costs of political advocacy are not allowed to be

charged to Government contracts or grants, either directly or indirectly. Now, on that one we haven't seen a lot of disagreement.

The second part would preclude the use of Federal funds for the payment of costs of items such as salaries or facilities also used for political advocacy, and that, right there, is where the firestorm started.

The comments we have received so far, that we will receive during this hearing and I am sure during the next few weeks, indicate that we must revise our approach on this second point. Furthermore, we must restrict the definition of political advocacy basically to grassroots lobbying and efforts to influence the Congress only.

Because of the extent of these changes, we have decided, like I mentioned, to revise this proposal. We will come out with it in several weeks. We will permit another 45 days for public comment. The final revisions will probably be coming out in 4 or 5 months, sometime during the summer. We do not affect—or these changes will not affect any programs that are funded this year, and that is an important point.

And beyond that, Mr. Chairman, I would say that I would be more than happy to answer any questions, take any suggestions you have and we would like very much to work with this committee in coming up with those revisions which are appropriate to the entire cost definition package of A-122, to fit what I perceive is the common goal as you established in the beginning—and that is to insure that improper lobbying does not occur with Federal funds.

[Mr. Wright's prepared statement follows:]



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

TESTIMONY OF JOSEPH R. WRIGHT, JR.
DEPUTY DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

MARCH 1, 1983

Mr. Chairman and Members of the Committee: Thank you for the opportunity to appear today to explain the purpose of our proposed revisions in Circular A-122 and to hear your comments and questions. This is an area of great complexity and sensitivity, and I would like to assure the Committee at the outset that we are by no means committed to the precise terms of the published proposal. Our Federal Register notice of January 24 was just that: a solicitation of comments. As I will explain further in a moment, already we have identified a number of areas in which significant revisions in the proposal will need to be made, and intend to publish revisions in the proposals for further comment within the next two weeks.

Nonetheless, I would like to emphasize the Administration's belief that the use of federal funds for political advocacy purposes should be curbed. Not only is it a misuse of the

taxpayers' money -- particularly in these days of fiscal stringency -- but government subsidy of the political advocacy activities of particular private companies or organizations can distort the political process. It is unfair for contractors or grantees to use taxpayers' money to support causes that the taxpayers may not agree with. This Administration is committed, as Director Stockman's memo of April 26, 1982 confirms, to the principle that grants and contracts should be awarded to those parties which are most effective in fulfilling statutory purposes, regardless of the extent or nature of their political advocacy. This does not mean, however, that we should pay for this advocacy.

The diversion of taxpayers' money to private political purposes is not a new problem to us, and it is not a new problem to Congress. The General Accounting Office uncovered grantee violations as long ago as 1948. Over the past ten years, some 40 to 50 riders have been attached to appropriations bills to address some parts of the problem. After a recent investigation into political advocacy activities by grantees under Title X of the Public Health Service Act, the Comptroller General issued the following recommendation:

Clear federal guidance is needed both to ensure that Title X program funds are not used for lobbying and to preclude unnecessary controversy over whether grantees are violating federal restriction. The move to revise and make more specific the cost principles applicable to all federal grantees is the appropriate mechanism to achieve these ends.

This investigation and recommendation show the need for improvements in the treatment of political advocacy costs in the current A-122 cost principles, since they have been in effect since 1980 and applied to the grantees under investigation. Our proposals are intended to achieve these ends -- to protect the taxpayer, to enforce restrictions passed by Congress, and to provide a consistent and comprehensive approach to treatment of costs associated with political advocacy by grantees and contractors. As the intensity of reaction by affected groups to our notice has shown, our task is not an easy one. But with the help of comments from the public, from this Committee, and from interested parties, we believe we can make a significant, fair, and workable step toward our commonly-accepted objective of ensuring that the expenditure of federal funds through grants and contracts does not result in an improper advantage to one or another participant in the political marketplace of ideas.

Allow me to review the current state of laws and procedures for the control of funds going to political advocacy. There are two generally applicable federal laws covering lobbying with appropriated funds: one criminal -- Section 1913 of Title 18 of the United States Code, one a restriction on use of appropriations -- currently Section 607(a) of the Treasury, Postal Service, and General Government Appropriations Act, as incorporated in the continuing resolution. In addition, Congress has enacted lobbying restrictions applicable to specific agencies, especially those with a history of problems in this area. Nonetheless, abuses of the system have been frequent and disturbing.

o In its investigation of family planning grantees under Title X of the Public Health Service Act last fall, the General Accounting Office audited seven representative grantees and found that all seven had incurred questionable expenses in connection with political advocacy. Federal funds were used for dues to lobbying organizations, for direct lobbying at the federal and state levels, for organizing writing campaigns to Congress, and for other political activities. Perhaps most alarming is that accounting systems under current procedures are so confused that GAO could not determine in two cases whether the organizations' lobbying involved federal funds or not.

o On the defense side, in a recent investigation of Lockheed's lobbying campaign on the proposed \$10 billion procurement of the C-5A aircraft GAO found that nearly half a million dollars in lobbying costs were included in the company's overhead expenses -- 54% of which would be picked up by the federal taxpayers. Moreover because of the commingling of improper lobbying activities with legitimate contract work and the inability of the current system to enforce rigorous distinctions, GAO was unable to determine the amount of employee time improperly used.

o The same investigation revealed that Boeing, lobbying on the other side of the issue, also incurred political advocacy expenses which it sought to charge input to the government through overhead accounts.

o In audits released to Common Cause by the Defense Department under the Freedom of Information Act concerning the political activities of ten defense contractors in 1974-75, auditors had discovered over \$2 million in questionable expenses charged to the government related to lobbying, including the cost of goose hunting trips in Maryland, a film praising the B-1 bomber, and decorations for a "Sky Suite" at the Capital Center Sports Arena.

o In 1980, the Food Research and Action Center, a Community Services Administration grantee, used federal funds for generating a public campaign against the Department of Agriculture's pilot "workfare" program, including a call to "monitor and hassle" workfare projects and to campaign at the state and county levels to block applications to be part of the pilot project.

o In 1981, the American Health Planning Association solicited federally funded health systems agencies for increased contributions for a lobbying campaign. At least 14 of the agencies responded with federal funds.

o This is only the tip of the iceberg -- only a few of the instances in which a Member of Congress or the public caught wind of a possible violation, and it could be documented. I can provide this Committee with numerous instances of apparent questionable practices -- cases in which recipients of federal grant or contract money engaged in political advocacy activities and may well have employed federal funds. Sources as diverse as Common Cause magazine, the Conservative Digest, and the Washington Post have confirmed the problem and called out for reform.

What are the deficiencies in current procedures? Why is a new approach needed? In our reflection on the problem, and careful study of GAO and other recommendations, we have recognized several problems with current cost principles that have made it difficult to detect -- and indeed have invited -- diversion of federal funds to political advocacy.

First, there is currently no uniform, comprehensive policy on the treatment of costs associated with political advocacy. The clear signal from Congress through appropriations laws and other actions has not been translated into management controls. Grant and contract making agencies do not, as a routine matter, incorporate political advocacy restrictions into award agreements or cost negotiations. There is no clear, uniform definition of prohibited activities to

which they can refer. In fact, in both of the major recent GAO investigations of improper expenditures for lobbying -- the family planning and Lockheed cases -- the contractor or grantee were able to urge that current rules did not ban the expenditures. One purpose of our proposal is to bring uniformity and coherence to this area.

Second, under existing procedures, restrictions on the use of federal funds for political advocacy are exceedingly difficult to enforce. The commingling of grant or contract activity with political advocacy activity makes it very difficult for an auditor, after the fact, to determine whether federal funds were diverted to improper purposes. GAO reports have confirmed this. Moreover, even where violations were uncovered, the current system permits of no effective sanction in most instances. The recovery by the government of a small allocable share of costs wrongfully billed to the government provides no deterrent to misconduct, and in many cases is so small as not to justify enforcement at all. Thus, as you are aware, in a number of instances in which GAO has uncovered violations of this sort, it has been forced to recommend no corrective action.

Third, even when existing restrictions on lobbying are fully enforced, the provision of a grant or contract to a particular organization can have the effect of subsidizing its

political advocacy activities. Clearer definitions of proper and improper expenses are needed to avoid inappropriate federal subsidies of political advocacy activities.

Fourth, when government-funded projects or government-paid individuals engage in public political advocacy, especially at the grass roots level, it creates the appearance of government support for the subsidized positions. Therefore, it is not surprising that we have received letters from members of the public, who are understandably concerned when they see their tax money involved in projects that include political organizing for causes they may not support.

Now, these are serious problems and I don't begin to suggest that we have worked out an ideal solution to them. There may be no ideal solution. The approach in our proposal has been to effect a greater degree of separation between political advocacy activities and grant or contract activities. The essence of our proposal is twofold: first, we make the direct and indirect costs of political advocacy unallowable on a government-wide basis. We have heard relatively few objections to this portion of the proposal. Second, we have proposed that the federal government not pay for grant or contract activity if that activity is conducted with personnel, equipment, or facilities also used for political advocacy.

It is the second portion of the proposal that has provoked the most comment, and we understand why. Let me make clear for the record that we appreciate the problems that would be entailed if the government refused to pay for goods or services it receives because of relatively minor, technical, or unavoidable contacts between the contractor or grantee and government officials. We intend to make major changes in the proposal to address this problem.

On the other hand, let me also make clear for the record that the Administration is not simply content with the status quo, or with mere souped-up accounting and paperwork requirements that would make life difficult for smaller organizations but allow the larger entities with high-powered accounting firms to carry on business as usual. So, even as we recognize the need for substantial revisions in the proposal, we have not lost sight of the objective: to reduce the federal taxpayer subsidy to the political advocacy activities of private companies and organizations.

Let me outline our current thinking on a revised proposal. Obviously, I cannot provide specifics on a revised proposal we have not yet completed. We are still developing ideas in response to public comments and suggestions. Nonetheless, I can share with the Committee some of the major areas we are rethinking.

First, we are considering a redefinition of "political advocacy" to exclude contacts with members of the Executive Branch. As far as direct communications with government officials are concerned, we may essentially confine the reach of the definition to legislative lobbying. This is in recognition that grantees and contractors have a wide variety of necessary and legitimate contacts with those who execute the laws, from checking with the Small Business Administration about progress on a loan application to arranging with local traffic officials for repair of a street light. After due reflection on the matter, we have concluded that it may not be possible to draw clear or understandable lines between political and non-political contacts with Executive Branch officials.

Second, we are considering a modification in our proposal of requiring a full separation in use of equipment between political advocacy activities and grant or contract activities. As a practical matter, we have been persuaded that such a separation would lead to inefficient duplication of equipment -- with attendant increased costs to the taxpayer -- as well as difficulties in enforcement. We will still provide that, to the extent that equipment is used for political advocacy, the allocable portion of the direct and indirect costs not be charged to the government. But we may not insist that grant or contract activities be conducted solely with equipment not used for political advocacy.

Third, we are considering moderating the effect of our proposal in the area of personnel by applying the principle of separation only to registered lobbyists, persons who are effectively lobbyists, and persons engaged in public or so-called "grass roots" lobbying. We do not believe that the government should be paying any portion of the salary of a registered lobbyist. Nor do we believe that the Federal government should be paying any portion of the salary of a person significantly engaged in lobbying. We are considering various definitions of this, and specifically solicit comments and suggestions on this point. Finally, we do not believe the Federal government should pay any portion of the salary of a person who is publicly engaged in political organizing at a grass roots level. It could be viewed by many citizens as a breach of the public trust. Moreover, it is unnecessary, since the provision of goods and services to the government and the people does not, as a normal matter, necessitate political organizing. This is an easy line to draw, and will cause no hardship on legitimate operations of grantees or contractors. Of course, the proposal cannot apply to so-called "advocacy" grants, where Congress has specifically determined that organizational activities of this sort should be supported.

I would like to observe that this change in focus to grass roots lobbying and to direct lobbying on legislation is in accord with the basic thrust of congressional enactments over the last several decades.

Fourth, we are considering easing up on our proposal with respect to buildings and office space. Many affected parties have informed us that the proposed 5% limitation on political advocacy activity is too restrictive. On the other hand, we see no reason why the Federal government should help to defray the expenses of a facility devoted in major degree to political advocacy. Given the danger of subsidization of overhead and the appearance of government support and entanglement with private advocacy in such cases, we believe it is better policy to separate grant and contract activity from substantially political facilities. We are soliciting comments and suggestions on what an appropriate definition would be.

We intend to maintain the proposed prohibition on the use of federal funds for dues, contributions, or costs of membership in organizations heavily involved in political advocacy, such as most trade associations and many nationwide advocacy groups. This principle is already applied to state and local government recipients under Circular A-87, and the GAO has urged that A-122 be made consistent.

There are some who have argued that it is inappropriate for us to disallow any costs that would be allocable to a federal grant or contract. However, A-122 and other cost principles include many examples of costs which are not allocated, but simply disallowed on grounds of public policy: advertising, contributions, fund raising, entertainment, to name a few examples.

We believe that political advocacy costs, such as the salary of a registered lobbyist or the rent on a building substantially dedicated to political advocacy, should be treated similarly. This is not a punitive rule, but a preventative one: grantees and contractors can and should be able to comply without substantial interference with their legitimate, non-political grant or contract activities.

We are open to other comments and suggestions from this Committee or other sources. As I think you will agree, the changes we are now considering from our original proposal are significant. Therefore, we have announced that we will publish modified proposals based on these ideas in several weeks. We will then provide a new 45-day comment period on these modified proposals, which will last until about two months from today. We have learned a great deal from the public comment period so far, and will remain open to constructive comments and suggestions over the period to come.

Finally, for the record, Mr. Chairman, I would also like to submit the following documents:

- o A description of relevant Comptroller General opinions on the subject; and
- o The OMB release of Friday, February 25, including a set of questions and answers describing areas in which we intend to change the current proposal.

This concludes my prepared testimony. I would be happy to respond to questions.

Mr. BROOKS. Thank you, Mr. Wright.

What groups and individuals did OMB consult with before drafting this proposal?

Mr. WRIGHT. Drafting of the proposal was primarily done internally with consultation with our executive agencies. We were using the 45-day comment period to be able to get the opinions of those parties that would be affected on both the contract and the grant sides.

Mr. BROOKS. What statutory authority has OMB utilized to issue these proposed rule changes?

Mr. WRIGHT. OK, Mr. Chairman. Under the Budget and Accounting Act and the Budget and Accounting Procedures Act, we believe that we have the statutory authority which has been exercised through the previous circulars that I mentioned and this has been also verified by the Department of Justice.

Mr. BROOKS. Would you give the specific citation, Mr. Bedell?

Mr. BEDELL. I believe it is 31 U.S.C. 18a and the following sections. They stem back to the 1921 Budget and Accounting Act and the 1950 Budget and Accounting Procedures Act which provide authority for issuing plans, et cetera, for the efficient and economical functioning of the Government. Those authorities as you know were passed through to OMB through Reorganization Plan No. 2 of 1970, and by delegation from the President, I believe the Executive Order was 11541 in 1970.

Mr. BROOKS. The reason I was trying to find some statutory authority is I may decide to introduce a bill to kill it.

And I am still not sure that you have pinned down some statutory authority—there is a broad difference of opinion on that, you know, as to whether you have any statutory authority, really.

But you are sure that that is where you are getting it from?

Mr. BEDELL. Yes, sir.

Mr. BROOKS. I want to be sure where it is, because dealing with that is the next step, you understand.

Mr. BEDELL. We are sure that we are authorized by those sections to issue this circular, and many other circulars that you know we have issued for internal management purposes.

Mr. BROOKS. Why is proportional allocation between Federal and non-Federal funds acceptable for all other cost items but unacceptable for lobbying expenses?

Mr. WRIGHT. I am sorry, Mr. Chairman, I am not sure I understand the question.

Mr. BROOKS. They use the computer for work in company ABC on a big contract they have for somebody else. They also use that computer for Government work and they allocate that portion of the computer's time to their Government costs. And you don't have any trouble figuring those kinds of thing out. Why is it that you want to treat lobbying differently and make it a special category?

Mr. WRIGHT. Mr. Chairman, I think there is a simple answer to that and that is we do not feel that it is appropriate, and obviously the Congress has not felt it is appropriate in the past, to use Federal funds directly or indirectly for lobbying purposes and influencing legislation.

Mr. BROOKS. That is not a direct answer, Mr. Wright.

What I asked you was, why do you feel that you cannot allocate that portion of Government funding that is used for lobbying when you can very intelligently allocate computer time, and allocate expenses for typewriters and secretaries? What I want to understand is how you can do that so carefully and so beautifully in all other categories, but you can't do it in lobbying. I don't say that we should allow lobbying with Federal money. Don't put that in my mouth. I didn't say that. I said you should not. What I am saying is why do you think you cannot add up what they spend on lobbying and deduct it from their grants or from their total cost?

Mr. WRIGHT. Mr. Chairman——

Mr. BROOKS. You understand what I am saying?

Mr. WRIGHT. Yes; I understand exactly what you are saying. You are kind of taking our position a little bit right now, the one that has caused us a lot of problems, because then you get into your allocation schemes and particularly when you get into some of the nonprofits or the smaller organizations, they are the ones that are saying they would have a very, very difficult time in that allocation of dividing up lobbying versus nonlobbying.

And that is one of the problems we have got.

Mr. BROOKS. Now, under this proposal only those who are invited in writing to comment on some matter would be free of the effects of it. Wouldn't that encourage cronyism and favoritism, and all the favorite—as Mrs. Schroeder says, “lap dogs” would be brought in to the table to eat Chuckie dog food. But the rest of them would be outside in the yard scrounging in the neighbor's garbage.

Mr. WRIGHT. Mr. Chairman, are you asking why we ask for comments in writing?

Mr. BROOKS. Yes.

Mr. WRIGHT. We are taking the comments both verbally and——

Mr. BROOKS. No, no, when they are invited. Not comments in writing, invitations. They have to invite the lap dogs in to eat in the kitchen.

Mr. WRIGHT. Well——

Mr. BROOKS. The rest of the dogs are out in the street hustling garbage.

Mr. WRIGHT. Like I said, Mr. Chairman, we are going to be making quite a few changes.

Mr. BROOKS. Another thing, if political abuses are as widespread as you suggest, and I do not agree that they are—why have you exempted some of the largest Federal fund recipients like universities, hospitals, State and local governments? They hustle us all the time for big, big dollars.

Mr. WRIGHT. Mr. Chairman, I mentioned that there were three circulars and that one is Circular A-21, which was issued in the late 1950's to establish the cost principles for educational institutions. A-87 issued in the 1960's for State and local governments covered that area. So there is no reason——

Mr. BROOKS. You deduct the lobbying expenses out of their grants, and so forth? How do you handle that?

Mr. BEDELL. That is unclearly provided for in——

Mr. BROOKS. How is it provided?

Mr. BEDELL. Unclearly provided——

Mr. BROOKS. Unclearly provided for.

Mr. BEDELL. Yes, sir. In A-21 and A-87 it is not——

Mr. BROOKS. Well, that is an honest statement. I appreciate it. And I agree. But it makes this one also look unclear.

Mr. BEDELL. The existing A-122 or the proposed change to it?

Mr. BROOKS. The proposed change that's already recommended.

Mr. BEDELL. Yes, sir, we agree that in many respects it needs to be changed and hopefully clarified.

Mr. BROOKS. One other thing. Do you intend to restrict political advocacy by individuals as well as organizations that receive Federal funds? How about a veteran who receives a disability payment from the Federal Government or social security recipients who are getting payments from the Federal Government? Can they write to their Congressmen to volunteer their ideas about what the country ought to be doing?

Mr. BEDELL. Yes, sir. And that wasn't intended, I hope it wasn't covered by even the proposed amendments.

Mr. BROOKS. But where are they excluded if they get grant money?

Mr. BEDELL. Well, if they are part of an organization that is receiving grant funds, then the organization would be covered, but as individuals receiving some type of compensation from the Government, they would not be covered.

Mr. BROOKS. Now, in your statement, Joe, you say that you are considering a redefinition of "political advocacy" to exclude contacts with members of the executive branch and you want to include only contacts with the legislative branch. Most of these people don't feel like there is a lot of contact with the executive branch—either they agree with the administration or they know the administration is not going to agree with them. But it is Congress, it is the legislative branch that they want to talk with and you are going to limit it just to the legislative branch? Where is Congress going to get its information? Why can't legislators be open to suggestions of all of the divergent groups and opinions, so that we can get a valid conclusion?

Mr. WRIGHT. The problem we had with the executive branch, and again the net was thrown out too far on this one, is that we have a very difficult time dividing out the conduct of normal business with the executive branch versus lobbying, and we have not been able to figure out how that division, or how that definition could be made, such that this could be enforced.

With the legislative branch it is a little easier because what you have is registered lobbyists, you have a definition of what grassroots lobbying is, and so we believe that we can focus on those pure lobbying efforts without restricting marketing activities that you will have in order to sell services to the executive branch or providing them information that the legislative branch may request in the forms of hearings or written documents or whatever it is.

Mr. BROOKS. Sometimes it is only from registered lobbyists, as you describe them, that you get a full definition of the facts that represent their viewpoint. Sometimes the people at the grassroots don't have that kind of documentation either so they agree. I think that the truth is the truth whether it comes from a registered lobbyist in Washington who has 59 lawyers on his personal staff and has been here for 40 years practicing, or whether it is Joe Doe who

calls from home saying he is not for something, or he is for it. I think you are going to have trouble drawing that line.

Mr. WRIGHT. We have trouble——

Mr. BROOKS. It is going to be difficult to say lobbying is lobbying is lobbying.

Mr. WRIGHT. Yes, we have trouble drawing this line——

Mr. BROOKS. That line gets tough.

Mr. WRIGHT. Well, see, this was the purpose though, basically, for all——

Mr. BROOKS. It is like my little boy on a computer playing a new game and the lines go all over—that's kind of the way this looks. This is not your best effort. I am glad you didn't have anything to do with it. You didn't draft this, did you?

You did not draft this, did you, Joe?

Mr. WRIGHT. No, sir, I didn't.

Mr. BROOKS. Did you recommend it?

Mr. WRIGHT. Did I recommend this be drafted?

Mr. BROOKS. Did you ask Mr. Horowitz to draft this proposal?

Mr. WRIGHT. Mr. Chairman, this was a decision to proceed by the administration and I support the decision.

Mr. BROOKS. All right. Are you now going to stay with this version or are you just going to tear this one up and start over?

Mr. WRIGHT. No, sir, we are going to be coming out with a revised regulation in several weeks. And we are going to go through a comment period all over again.

Mr. BROOKS. And you are going to go through a hearing all over again, if it isn't revised well. Why don't you just tear this one up and start over?

Mr. WRIGHT. Because if you tear this one up literally, what you are going to be doing is taking away the comments that people and organizations have been working on now for 2 or 3 weeks and we may as well take advantage of the work they have already done to come up with better definitions on the cost principles. That's all.

Mr. BROOKS. When you have finished reading this record and hearing these people who represent hundreds and hundreds of organizations that believe the best thing you can do with this is to withdraw it, and then start over, ab initio, you will start anew.

Mr. WRIGHT. In effect that is what we are going to be doing when we come out with another set of revised regulations.

Mr. BROOKS. I recognize the gentleman from New York, Mr. Horton.

Mr. HORTON. Thank you, Mr. Chairman.

I am concerned about this procedure also. I think it would be better to recognize that you have already received many excellent comments. It seems to me that you can certainly still use those comments, even though you don't proceed with the proposal you have made. Well, let me ask you, do you think that there has been a mistake made with the A-122 proposal?

Mr. WRIGHT. Mr. Horton, I believe that the purpose and the intent to come up with clear guidelines was correct. I think that the approach and the package that was first put out needs to be thrown out and substantially revised.

Mr. HORTON. You made a Freudian slip.

Mr. WRIGHT. No, I didn't. I just jumped in front of myself in the sentence.

Mr. HORTON. It should be thrown out. But it seems to me that you would be on much sounder ground if you went back and actually had some hearings and meetings with people. You are in a very, very, difficult, complex legal thicket. When you start talking about defining lobbying activities, when you talk about advocacy, when you talk about limiting people's access to elected officials or administration officials, you are dealing in very fragile issues, and you may very well find yourself subject to constitutional questions that could be the result of lawsuits. With something so complicated as this, I think it would be very much desirable to have you go back to the drawing board and give some thought to specifically how you want to handle this without regard to what has happened in the past. As I said earlier in my testimony, I had constituents come in to see me about the proposal. They gave me a copy of it and I just couldn't believe it. They said that they would not even be able to talk to me next time when I had office hours out in my district. And I agreed with them. And I just think that even though you are trying to accomplish a goal, you won't accomplish it by rushing this proposal through.

This press release says the extension will provide another 2 months for comment on proposed revisions to Circular A-122, entitled "Cost Principles for Non-Profit Organizations," and then this extension will be accompanied by publication in 2 weeks of a revised proposal which will start a new 45-day comment period. I am a lawyer, and I have been up here for a long time, but if you said to me, Frank, I will give you 2 weeks to sit down and draw up these regulations, if I spent 24 hours a day with all the staff that I needed, I still wouldn't be able to come up with something that would run the gauntlet.

I think you need more time and I think you need more consultation. I think you need some consultation with the staff of this committee to try to come up with something that can be acceptable. We are talking about trying to prevent Federal funds going for pure and unadulterated lobbying, and that is a long way from what you are trying to do here. As I said earlier, this proposal is nothing more than a gag rule.

In your statement, you have given several examples of reimbursement that shouldn't be allowed. The pages of the statement are not numbered, but about halfway through there is a bullet in the middle of the page, and next to it is a notation that in a recent investigation of Lockheed's lobbying campaign on a proposed \$10 billion procurement of the C-5 aircraft, GAO found that nearly half a million dollars in lobbying costs were included in the company's overhead expenses, 54 percent of which would be picked up by the Federal taxpayers. Well, I don't think that anybody would disagree with you that that is wrong, and something should be done about it.

Now, there are procedures as you well know, that can be used to do something about that. There are Inspectors General in all of the agencies including the Department of Defense, which incidentally, I might say, we did get through in a bill last year, but there hasn't been a nomination by the President for the Department of Defense

IG, and I think 4 or 5 months have gone by. Is there any expectation that shortly the administration will be sending up a name to fill the position of Inspector General for the Department of Defense?

Mr. WRIGHT. Yes, sir. There is.

Mr. HORTON. Well, certainly that would come under the purview of the Inspector General's operation, and I would think that he could handle that without any regulations, couldn't he?

Mr. WRIGHT. Mr. Horton, again he can if you have clear definitions of what they are to audit or investigate and one of the big problems that we have got here, and the reason that A-122 was put in place, is because we were requested to come up with clear definitions of cost principles, what is allowable, what is not allowable.

Mr. HORTON. What is in the contract?

Does the contract provide that any of those funds could be used for lobbying? Now there is a contract, isn't there?

Mr. BEDELL. Yes, sir. The contracts and the ones in question I am sure refer to what is known as part 15 of the Armed Services Procurement Regulations now known as the Defense Acquisition Regulations. They incorporate by reference essentially the same cost principles that we are talking about here. But it is very unclear exactly how the lobbying expenses should be charged. It is clear that they can't be direct charges to the Government, but it is unclear whether they can be indirect charges. Now, the Comptroller General has held in many decisions that it is inappropriate, unlawful for them to be charged indirectly to the Government. But both Lockheed and Boeing have said that they disagreed with that and that they were appropriate charges and sought the 54 percent that the Government was going to—

Mr. HORTON. Well, they ought to go to court on that one because I think if there is 54 percent reimbursement, and they are doing that kind of lobbying, and spending nearly half a million dollars on it, then I think there ought to be some court interpretation as to what were lobbying costs. Let the court determine that particular dispute. And that is really how you are going to have to decide these questions ultimately, anyway.

But if you do feel that there is a valid reason for that type of clarification, then I think you ought to go back to the drawing boards and spend some time on it; don't do it in a hasty way that you contemplated. All you are saying now is that somebody in 2 weeks is going to come out with another proposal, and I don't care who handles it, they are not going to be able to come up with the kind of proposal that is going to walk through this gauntlet. When I use that expression, I am not talking about a room full of people here that testify before this committee, but I am talking about legal complexities that involve the various constitutional questions of freedom of speech, the ability of people to communicate with their elected Representatives, and so forth. To walk through that maze is going to take some time, and I think you ought to spend more time than 2 weeks. I would hope that you could pull the whole thing off the drawing boards and say, look, we are going to start all over, as the chairman said, from the very beginning and come out with something that really attacks the problem. And I

think the more simple your solution, the better off you are going to be.

Mr. WRIGHT. In effect, Mr. Horton, that is what we are going to be doing. Now, we are going—let's talk about the process a little bit. We think that we will be able to make enough substantial changes to the proposal within a 2-week period of time so that we can get some good responses during the next month and a half. If we find that we cannot, or we get into serious legal problems or we have not made it simple enough, or there are still major disagreements about it, I have absolutely no problem with going ahead and extending that time period. We do not see coming out with any final revisions to the A-122 until around the summer, 4 or 5 months from now. And if we need more time than that, we will take it. However, this is something—this is an area where we have been requested to come up with clearer definitions and I don't believe that you would have the problems like you are talking about right now if we didn't provide loopholes by the fuzziness of the existing regs and that is all we are trying to clarify.

Mr. HORTON. Well, you are going to have a problem with regard to enforcement, you are going to have a problem as to lobbying of elected officials, or advocacy with elected officials, you are going to have trouble in definitions, you are going to have trouble with constitutionality questions, you are going to have trouble as to whether or not people can make contacts with the administration, et cetera. I can think of thousands of problems, and I don't need to spend the time now going through the different types that are going to arise as you try to walk through this thing. But I do think that you would be well advised to take more time. I have some question with the procedure that you are using, and I don't know why you have to do things that way. I really don't see a good sound reason for it. I have no problem with your coming up with something by way of a Circular A-122 to try to establish cost principles for nonprofit organizations to accomplish the kind of goals that the chairman and I were both talking about and which I think you are trying to accomplish. But I just think that the procedure binds you, and that is going to be a very difficult thing for you in 2 weeks to come up with that kind of thing. You cannot go back with the 122 that is before you and just make a couple little changes and then come back with it because that is not going to solve the problem.

Mr. BROOKS. Mr. Lantos, the gentleman from California.

Mr. LANTOS. Thank you, Mr. Chairman.

Mr. Wright, you are here on a mission of damage control and you are doing a very good job of it. I want you to understand that since you had nothing to do with the drawing up of this circular, my questions are not personal but they are related to the process within OMB.

One of the problems it seems to me that we have in this Government in the wake of Watergate, is to restore credibility to Government. I really wonder whether your opening statement does that and if you will allow me, I want to quote from your opening paragraph.

You say "Our Federal Register notice of January 24 was just that: a solicitation of comments." But I don't think that is true. I think your Federal Register notice of January 24 was a solicitation

of comments on what OMB thought was the best OMB could come up with. And I truly wonder whether you would not be far better off if you would come before us and say we made a very serious mistake. We goofed. Or whoever did this is symbolic of the rigid ideological doctrinaire approach which we have come to see from this administration on so many issues totally unrelated to the real world. But I don't think you are going to get away, and you can sense this on the Republican side also, by trying to minimize what in fact happened here because while this problem is not nearly as severe as the problems we are probing at EPA, it is symptomatic of something far deeper than just the poorly drafted circular. When the ranking Republican on this committee, my distinguished friend, refers to this circular as outrageous, when responsible people refer to it as insidious and crazy, I don't think you can just dismiss it by saying that it will need a bit of revision.

I think you should come here, or better yet, David Stockman should come here and say, "Mea culpa, mea maxima culpa," we made a very serious mistake, we know that we made a mistake, you know that we made a mistake, we want to go back to the drawing board, then start all over again. OMB can be accused of a lot of things, but it is not a stupid agency. David Stockman is not a stupid official of this Government. He is one of the brightest and the agency is filled with very bright people. What we are dealing with here, and I do want to come to your issue of process, what we are dealing with here is a quintessential manifestation of a doctrinaire ideological approach to social problems totally divorced from reality. You did achieve something remarkable. You united for the first time the broadest spectrum of private and public organizations in the history of this Nation against your proposal.

Now, shouldn't this give you or someone in OMB pause? Shouldn't this be an occasion to explore perhaps a touch of humility in your approaching social problems? I know you will withdraw this; whether technically you will withdraw it or not is really secondary, you will start afresh. You will be ultracareful, you will come in with something that we will be able to live with. At least I hope you will.

But I think we will have to do more than just redraft this circular. I think the way the circular came out should have a profound lesson for the processes within this administration because I don't think that it is isolated from, for instance, the demand that a Canadian Government film be designated as propaganda. That demand by another agency of this Government has made us the laughing stock of the democratic world and that brilliant circular will also be withdrawn. Because it also stems from a narrow, self-righteous doctrinaire ideological view of the world. You would score far better by me if you would admit this and not just pretend this is a complex issue and we have to do better. Because if it is a complex issue, you certainly ought to have solicited the advice and the counsel of Congress, of private business and nonprofit organizations, a broad range of groups that have an interest in this and then come up with a far better product. I don't think you will get away with presenting something outrageous and then sort of sliding into a slight revision. I think this is analogous to say that a jobs bill is unneeded and then a few weeks later supporting a jobs

bill which is what this administration is doing. I think it is analogous to a zero-zero option in nuclear disarmament and then sliding away from it and recognizing that intermediate possibilities are rational and logical. I have only one simple question:

Stepping out of your official role for a moment, how would you characterize this whole episode?

Mr. WRIGHT. Congressman, you want me to step out of my official role in the middle of a hearing?

Mr. LANTOS. Well, I think the chairman would let you do that.

Well, don't step out of your official role—just give us an honest answer. Just give us an honest answer.

How do you appraise the performance of OMB in this particular instance? On a scale of 10, where are you?

Mr. WRIGHT. I will give you a very short answer. I think that what you are doing is taking an attempt to provide better definitions to cost principles in an OMB circular which has been requested not only by the inspectors general, but by the agencies over the years, and you are expanding it into a philosophical difference between the two political parties which I believe puts much more thought process, both devious—

Mr. LANTOS. Not the two political parties, the ranking Republican was most critical of you. More critical than we Democrats have been.

Mr. WRIGHT. I don't believe from a philosophical standpoint he was. I would say from the process standpoint he was and I believe he was justified in doing so. Plus the fact I first brought out, if we did not feel that we made a mistake in the first issuance within the Federal Register, we would not say that we are going to come out and put out another revised proposal.

Mr. LANTOS. But it is self-evident that you made a mistake. I don't think that is a great admission.

Mr. WRIGHT. I agree with you and so therefore we didn't even pretend when we first came up that we were going to fight that issue. That was not a good package that first went out, and it went way too far. We have already admitted that but I believe for you to take it into a philosophical issue when we are really into a fairly boring process of trying to define better cost principles is really going beyond what was ever intended or is the fact.

Mr. LANTOS. Thank you, Mr. Chairman.

Mr. BROOKS. Mr. Waxman, a very distinguished member of this committee from California.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

I want to thank you also, as other colleagues have done, for holding this hearing. This hearing will hold up to public scrutiny the outrageous proposal that OMB has circulated and I am pleased to see they now reject their own original thoughts. But I am not so confident that in redoing this we are going to see a much better proposal for the very simple reason that OMB is stepping in an area that is very, very frightening. They are stepping on the Constitution of the United States and the ability of citizens of this country to express their point of view. I realize these two witnesses here today have handled themselves well in spite of the redeye flight, which Mr. Lantos and I are quite familiar with, coming from California. But you are really here to catch the flack. Mr. Stock-

man is not here, Mr. Horowitz is not here; they are not here to answer what their original purposes were. I suspect that Mr. Lantos' description of their original purpose is quite accurate, that the original purpose of motivating this action by OMB was based on a deep and narrow ideological point of view which is willing to throw out the Constitution of the United States to get at the enemies of those people who believe as the self-righteous and the hard rightwing see the world. Their enemies are the people in the family planning clinics, the people working on social services programs of one sort or another, and all the nonprofit corporations. Those are the people they see as their enemies. They are the ones who come in every year and tell Congressmen that there are children in this country who are dying, there are people who are starving, that unless government acts, we are going to see tremendous amounts of injustice go on, and they just as soon not have Congress hear these stories from people who know about those things because Congress then responds by passing laws, sometimes appropriating money, in trying to do something about these problems.

I think that you can't come up with a good solution because I think the whole project is based on the wrong motives. I could go into questions with you about what political advocacy means and I just ask one question: Will you look at political advocacy and the costs to the Federal Government; are you looking at the amount that is deducted from taxes by corporations who pay lawyers to present their point of view in a way that is most favorable? Are you looking at the deductions that are taken by corporations which means taxes not paid into the Federal Government by advertising that is considered institutional as opposed to advocacy? Are you looking at the loss of money in that respect so that you can see whether the taxpayers that you express concern about in your statement are unhappy about losing these Federal dollars? Are their complaints in that regard answered?

Mr. WRIGHT. Let me answer in two ways, Mr. Waxman.

First of all, when you say that the A-122 revisions are primarily against—

Mr. WAXMAN. Now, I asked you a question. And my question is this: Are you going to look at revisions? The reason you have a circular at all is because you say taxpayers are angry that their money is being used to lobby. Now, taxpayers are angry that their money is being used to lobby because their money and other people's tax moneys are not coming in, because they are being taken off as a deduction. I consider that an expenditure of the public funds, because those are funds that otherwise would be collected by the Federal Government by way of taxes. Are you looking at that issue at all?

Mr. WRIGHT. First of all, OMB does not look at tax issues through its circulars, No. 1.

No. 2, I have to add this for the record, and that is that if we would have just gone for changes in Circular A-122, then I would agree with your comments as to the organizations that would be affected by this, but we did not do that. We purposely extended it into procurements and contracts through DOD, GSA and NASA for exactly that reason.

And by the way, the objections that we heard were not from the nonprofits to begin with——

Mr. WAXMAN. Mr. Lantos pointed it out accurately, and we will see who is here next time. I suspect that the nonprofit people will still be here after your next proposal, because I think that is the ideological genesis of this whole effort by OMB. So you are not looking at the tax consequences and how taxpayers are losing dollars because of lobbying by corporations. That is clear.

Now, let me ask you about another issue. OMB is concerned about the amount of money that is spent on regulation. This administration has told us that we don't want to have regulations that cost a lot of money. Have you done a fiscal impact study on what these proposed regulations would cost?

Mr. WRIGHT. No, we have not.

Mr. WAXMAN. Do you plan to?

Mr. WRIGHT. We will be looking at that, yes, before we come out with any final regulations.

Mr. WAXMAN. Doesn't this administration look at the costs of regulation, the impact costs both on the citizens that are required to comply with it, as well as the governmental costs that are going to be required to enforce it?

Mr. WRIGHT. As best we can, yes, sir.

Mr. WAXMAN. You think you can make a good evaluation of that in a couple weeks?

Mr. WRIGHT. No, absolutely not. Within a couple of weeks, we are planning to come out with a revised proposal; go through a comment period again, take a look at the comments, and then spend several months, as much time as we need, before we come up with anything final.

Mr. WAXMAN. It sounds to me like you are just throwing up trial balloons and seeing who shoots at them. Don't you do some study in advance to try to determine whether the proposals you put forward make sense or not?

Mr. WRIGHT. Yes, sir, we do.

Mr. WAXMAN. But you are not going to have a financial impact study on these proposed regulations at all. You are going to wait to see what the comments are and then do some study later, presumably.

Mr. WRIGHT. There is no reason to do that within several weeks when you are going out to get additional comments, no, sir.

Mr. WAXMAN. Well, you are going to put forward some proposed regulations. Before you put forward your proposals, don't you want to find out how much it is going to cost people to comply with those proposals?

Mr. WRIGHT. No, sir, because we are not going to have any idea what the regulation is going to be until we get the comments and we know what to measure the cost up against.

Mr. WAXMAN. You have got a real chicken and egg problem over there, at OMB, don't you?

If you are going to put forward a proposal with the administration's idea of what to do, before you know what your idea is, shouldn't you study it and think it through and then see whether you missed out on some points? Obviously, with this proposal, you missed out on a lot of considerations. So I think, Mr. Chairman, I

would just conclude by saying that at this hearing, you Mr. Wright, are catching the flack, but I hope you will go back and tell Mr. Horowitz and Mr. Stockman and others in the administration that there is a very cool reception in the Congress to this whole idea. Furthermore, within your own determinations at OMB before you come up with these regulations, some of us would like to know that you have looked at not only the Constitution of the United States and how many individual civil liberties are going to be trampled upon, but whether the people are going to be paying for the cost of this in a way that will make no fiscal sense whatsoever; that you have looked at whether the regulation is going to be too burdensome for those who have to live with it, and that the cost to the Government to try to make all these fine distinctions is going to be so incredible that we are going to have fill OMB with a whole army of people just to go out and investigate and inspect and scrutinize whether anybody is saying anything to their Congressmen that may well be out of line with what OMB thinks. That is why we have a Constitution. These kinds of exercises shouldn't be done by bureaucrats. They shouldn't even be done by Congressmen. We protect the public under the Constitution from the whims even of the majority of the country and that is why I think your whole project is doomed to failure and should be abandoned completely, except maybe in a very narrow way to enforce the laws that are on the books now that make it a crime to use Federal money to come in and lobby.

Thank you, Mr. Chairman.

Mr. Brooks. Thank you very much, Mr. Waxman.

I might say that when things get dull, you might want to make an interesting study on lobbying. You might take a look at that Lockheed operation when Mr. Weinberger, Mr. Carlucci and Lockheed worked very carefully at lobbying Congress. They were lobbying the legislative branch fully, not the executive. They had printouts—and I have a copy—of all the Members of Congress and after they finished lobbying they gave grades to individual Members. I don't know what kind of grade I got. At any rate, they had a list of who was going to see various Members, for example. Do you know who was going to see Mr. Addabbo on the printout? Carlucci, one on one.

Bill Alexander? General O'Malley was going to see him. Brooks, I don't see Brooks on here. Let me find it; let me see if they have got Brooks on here.

Brooks, Jack Brooks—Marine or Army followup. Letter sent May 24. Member contact, Bernard. He's a Member of Congress from Georgia, very nice fellow, and a subcommittee chairman. I think that is important. That is really impressive. Horton—let me tell you about Horton.

Frank Horton, Member contact McDonald. He's from Georgia. He is independent. The DOD and Air Force will see Mr. Horton, RKC. I don't think we ever figured out who RKC was? He is somebody who sees lots of people, though, he is named a lot of times.

Isn't that interesting? That's the kind of thing you might look into—whether it is appropriate for the Defense Department to use defense contractor expenditures and printouts and have a little headquarters meeting every morning to regroup and update their

information on what the Members are doing. It was a fascinating little exercise. You'd have thought they were fighting a war, but that is what they did and here is the printout. You may have a copy of it, if you would like. And if you want to deduct all those costs from Lockheed as lobbying, go ahead. That would be interesting. Carlucci won't be calling any more for the Defense Department, but I guess somebody else will. They spent lots of money and graded Congress on how they did. I think that is fascinating. I would just love to hear their evaluation. If OMB wants to grade us, you all can run your little printout, too. We'll get a printout on OMB on the record too, because everybody will get to vote on this proposed regulation if you keep bringing it back like it is.

Well, we thank you and call on Mr. Clinger, a very distinguished member of this committee and a former bureaucrat. I wish he had been down there at OMB as he would have written a much better regulation. Mr. Clinger.

Mr. CLINGER. Thank you for those kind words, Mr. Chairman. Having been a bureaucrat, I am not sure that that is the case because I think—Joe, I think you get the sense from questioning the committee that nobody is very happy with this redraft of A-122 and for the record, do I understand you to say that the version that we had before us is or has been withdrawn?

Mr. WRIGHT. The process, Mr. Clinger, is we will be coming out with a substantially revised version in 2 weeks.

Mr. CLINGER. In 2 weeks time.

Mr. WRIGHT. In effect, it will replace the one that is existing right now, so yes, from a practical sense it will be withdrawn.

Mr. CLINGER. There has been some allusion here that you were contemplating changes and some of the questions indicated that these might only be minor cosmetic revisions. Is that the way you would characterize how you propose to redraft this?

Mr. WRIGHT. No, sir. They are going to be fairly substantial changes.

Mr. CLINGER. There has also been suggestion here, and I think this is critical to the whole discussion, that there is some hidden agenda in attempting this exercise at all, that there are some ulterior motives, that there is an attempt here to put a gag rule on particular groups, whether in the humanitarian area or whatever. You have characterized it primarily as designed to implement certain cost principles. What is your response to the charge that this is a hidden effort to place a gag rule on particular groups within the country?

Mr. WRIGHT. Mr. Clinger, I don't look upon this as placing any gag rule at all on groups, or the first amendment of the Constitution. I look upon this as an attempt to make sure that the Federal Government does not pay for lobbying costs it considers inappropriate. If you want to call it lobbying—which I guess gets into the entire area of speech as well as writing—they can do anything they want to, but we do not want to pay for it out of taxpayers' money when it is considered inappropriate by the executive, and the legislative branches.

It is not a question of whether or not they speak. It is a question of what activities does the Federal Government pay for out of taxpayers' funds. That's the question. Now, I have heard all of this,

you know, today, and to be honest I was a little surprised that this would be criticized from a philosophical point of view. But if it had been intended to be a gag rule, then we would not have extended it to the contracts and procurements through DOD, GSA and NASA. We purposely extended the same cost principles for exactly that purpose so that it would be even-handed across the board, across the spectrum. That is exactly why you found groups from both sides coming in with equal concern.

Mr. CLINGER. So you don't see this as a liberal-conservative, or right-left issue? You are saying that it treats everybody badly.

Mr. WRIGHT. That is not the purpose of it.

Mr. CLINGER. What about suggesting that there are laws on the books at the present time that do deal with this issue and that if we just made a more assiduous effort to enforce the existing law, we could get at the root of the problem. You obviously feel that there is a need to go beyond that to some extent.

Mr. WRIGHT. No, no. I agree with your statement entirely. There are laws out there to enforce, but I believe that the additional effort to enforce them requires a better definition of what is improper and what is proper. That's all. I don't believe we need any additional laws.

Mr. CLINGER. OK, thank you.

Mr. BROOKS. Thank you very much, Mr. Clinger, and thank you Mr. Wright. Thank you Mr. Bedell, you were gracious to have come down.

Our next witness is Charles A. Bowsher, the Comptroller General of the United States. He is a graduate of the University of Illinois, received an MBA degree from the University of Chicago in 1956, and was associated with Arthur Andersen in Chicago after graduation.

In 1967 he was Assistant Secretary of the Navy for Financial Management, appointed by President Johnson, and continued there until 1971. He went back to Arthur Andersen as a partner in the firm and later directed their Government service industry program here in Washington. He is accompanied today by Milton J. Socolar, Special Assistant to the Comptroller General, a former Acting Comptroller General. Mr. Bowsher, it is a pleasure to welcome you here today joined by your distinguished and able assistant, Mr. Socolar.

STATEMENT OF CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ACCOMPANIED BY MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL

Mr. BOWSHER. Thank you, Mr. Chairman.

I have a short statement, and I will read just the front part and be happy to take any questions.

We are here today to discuss the Government-wide regulations recently proposed by the administration to control political advocacy or lobbying with appropriated funds by Government contractors and federally funded nonprofit organizations.

The Office of Management and Budget, the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have simultaneously proposed

the adoption of identical regulations that prohibit the reimbursement of political advocacy expenses charged to Federal grants or contracts.

These proposed regulations are in part the result of a series of recommendations contained in GAO reports and decisions that the administration establish uniform Government-wide regulations prohibiting Government contractors and federally funded nonprofit organizations from expending appropriated funds for lobbying activities.

While we endorse the concept of uniform cost principle regulations governing political advocacy activities, we have certain reservations about the proposed regulations.

The Federal Government pursues its aim and promotes its purposes through payments of about \$100 billion annually to contractors and grantees. Every recipient of a Government contract or grant is unquestionably free to exercise the right to political expression free of restraint. It is equally clear, however, that the cost associated with political advocacy should not be financed with taxpayer funds through charges to Federal contracts or grants. The proposed regulations seek to assure that Federal funds do not finance political advocacy.

Now, we have two primary concerns with the proposed regulations which we have discussed in detail with OMB officials in the last few days. First we have had serious problems with the way the regulations treat allocation of costs between unallowable and allowable activities.

Our second concern relates to the scope of prohibitive activities included within the definition of political advocacy. We understand that OMB is prepared to make significant revisions to its initially proposed approach—changes which will go far toward ameliorating their far-reaching effect. Nevertheless, even with OMB's suggested revisions, there will remain an essential feature that troubles us.

Under the proposed cost principles, and as they might be revised, costs representing political advocacy are not merely disallowed but may cause otherwise legitimate costs also to be disallowed. The full salary costs of individuals are unallowable if any part of their work constitutes political advocacy or if their organization has required or induced them to contribute to any organization engaging in political advocacy during nonworking hours. The allowable portions of other expenses are also unallowable if any portion of the items involved are used for political advocacy. Under the revisions OMB is apparently prepared to make, some threshold amounts of political advocacy will control but the basic concept will remain.

In essence, grantees and contractors will be penalized for having individuals engaged in political advocacy doing any work otherwise properly chargeable to a grant or contract. We have serious reservations concerning the legal enforceability of these penalty provisions, as well as their desirability from a policy standpoint. Contractual provisions requiring forfeiture of reimbursement for otherwise allowable costs because of actions unrelated to contract or grant purposes generally will not be enforced. Under the OMB proposal it is clear that there is no reasonable relationship between the proscribed activities and the requirement for forfeiture where

the Government is not being charged in any way for those activities. We do not understand why engaging in political advocacy on one's own time is any different from engaging in any other non-reimbursable activity on one's own time. The key requirement is only that the nonallowable activity be separated from public financing.

Since the penalty can be so great, it could have a chilling effect on grantees and contractors in communicating with their program agencies concerning legitimate business. It would also make it necessary for grantees and contractors to add additional staff and equipment to replace staff and equipment that has been used previously for both permissible and impermissible activities on a cost allocation basis. This would increase the Government's cost for the same goods and services. Also, the requirement for small grantee organizations to physically separate permissible and impermissible activities could place such a strain on their finances as to threaten their continued viability.

We are also concerned with the scope of the definition of political advocacy, although here too, OMB indicates an intent to make substantial changes.

Mr. Chairman, I know you have a time problem today and I will put aside the rest of the statement and have it inserted in the record. I would only like to say that we are more than willing to work with the Congress, this committee and OMB to work out some changes in the regulations that could do what we think is necessary and that's to bring some uniformity to this whole area and some definition as to what is permissible and what is not permissible. We do not think that we have to go as far as OMB did.

[Mr. Bowsher's prepared statement follows:]

UNITED STATES GENERAL ACCOUNTING OFFICE

FOR RELEASE ON DELIVERY

EXPECTED AT 9:30 A.M. EST

TUESDAY, MARCH 1, 1983

STATEMENT OF
CHARLES A. BOWSHER
COMPTROLLER GENERAL
OF THE UNITED STATES
BEFORE THE
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY
COMMITTEE ON GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Subcommittee:

I am here today to discuss the Government-wide regulations recently proposed by the Administration to control political advocacy or lobbying with appropriated funds by government contractors and Federally funded non-profit organizations. The Office of Management and Budget (OMB), Department of Defense (DOD), General Services Administration (GSA) and the National Aeronautics and Space Administration (NASA) have simultaneously proposed the adoption of identical regulations that prohibit the reimbursement of political advocacy expenses charged to Federal grants or contracts.

These proposed regulations are in part the result of a series of recommendations contained in GAO reports and decisions that the Administration establish uniform Government-wide regulations prohibiting Government contractors and Federally funded non-profit organizations from expending appropriated funds for lobbying activities. While we endorse the concept of uniform cost principle regulations governing political advocacy activities, we have certain reservations about the proposed regulations.

The Federal Government pursues its aims and promotes its purposes through payments of about one hundred billion dollars annually to contractors and grantees. Every recipient of a government contract or grant is unquestionably free to exercise the right to political expression free of restraint. It is equally clear, however, that the costs associated with political advocacy should not be financed with taxpayer funds through charges to Federal contracts or grants. The proposed regulations seek to assure that Federal funds do not finance political advocacy.

We have two primary concerns with the proposed regulations which we have discussed in detail with OMB officials. First, we have serious problems with the way the regulations treat allocation of costs between unallowable

and allowable activities. Our second concern relates to the scope of prohibited activities included within the definition of political advocacy. We understand that OMB is prepared to make significant revisions to its initially proposed approach -- changes which will go far toward ameliorating their far reaching effect. Nevertheless, even with OMB's suggested revisions, there will remain an essential feature that troubles us.

Under the proposed cost principles, and as they might be revised, costs representing political advocacy are not merely disallowed but may cause otherwise legitimate costs also to be disallowed. The full salary costs of individuals are unallowable if any part of their work constitutes political advocacy or if their organization has required or induced them to contribute to any organization engaging in political advocacy during nonworking hours. The allowable portions of other expenses are also unallowable if any portion of the items involved are used for political advocacy. Under the revisions OMB is apparently prepared to make, some threshold amounts of political advocacy will control but the basis concept will remain.

In essence grantees and contractors will be penalized for having individuals engaged in political advocacy doing any work otherwise properly chargeable to a grant or contract. We have serious reservations concerning the legal

enforceability of these penalty provisions as well as their desirability from a policy standpoint. Contractual provisions requiring forfeiture of reimbursement for otherwise allowable costs because of actions unrelated to contract or grant purposes generally will not be enforced. Under the OMB proposal it is clear that there is no reasonable relationship between the proscribed activities and the requirement for forfeiture where the Government is not being charged in any way for those activities. We don't understand why engaging in political advocacy on one's own time is any different from engaging in any other non-reimbursable activity on one's own time. The key requirement is only that the non-allowable activity be separated from public financing.

Since the penalty can be so great, it could have a "chilling effect" on grantees and contractors in communicating with their program agencies concerning legitimate business. It would also make it necessary for grantees and contractors to add additional staff and equipment to replace staff and equipment that had been used previously for both permissible and impermissible activities on a cost allocation basis. This could increase the Government's cost for the same goods and services. Also, the requirement for small grantee organizations to physically separate permissible and impermissible activities could place such a strain on their finances as to threaten their continued viability.

We are also concerned with the scope of the definition of political advocacy, although here too, OMB indicates an intent to make substantial changes. OMB initially defined political advocacy as including attempts to influence Federal, State, and local legislative outcomes through contributions, endorsements, or publicity, and attempts to influence governmental decisions through communication with any participant in the decision-making process or the general public. The term Governmental decisions is in turn defined as including legislation on the Federal, State and local levels, administrative decisions, and formal informal adjudications.

We are uneasy about including "attempts to influence the administrative decision-making process" within the scope of unallowable political advocacy costs in the absence of a statute or other evidence of Congressional intent to go that far. While we recognize that lobbying of executive branch personnel with Federal funds by contractors or grantees is a legitimate area of concern, we foresee major difficulties in distinguishing between contacts between contractors or grantees and agencies which are permissible--indeed necessary--to the pursuit of the contract or grant objective and those contacts which constitute impermissible political advocacy.

As pointed out, OMB officials have stated that the proposed cost principles represent only a "first draft" to be modified in a great many respects before they become final. We think the issue covered by the proposed regulations is an important one which should be subject to full debate by all interested parties. We agree with the underlying premise that taxpayers should not be forced to support causes with which they might be in substantial disagreement. Indeed, we subscribe to the idea that taxpayer funds should be devoted to governmental purposes which do not include, except in rare circumstances, the financing of political advocacy. We think that any regulations go too far, however, when they require a Federal contractor or grantee to forfeit reimbursement for legitimately incurred expenses merely because the contractor or grantee has engaged in perfectly proper political advocacy with non-Federal funds.

It is evident that revision of proposed cost principles which deal with unallowable costs is required and that changes in the scope of the definition of political advocacy are also needed. We support the willingness of the OMB officials to deal with the concerns which have been raised, and we are prepared to work with OMB in developing revised cost principles which will protect both the taxpayer's dollar and the Federal grantee or contractor's right to compensation for legitimate work performed on behalf of the United States.

Mr. BROOKS. Thank you, General. Was GAO asked for its recommendations before the OMB issued the proposed changes in cost principles?

Mr. BOWSHER. No, we were not.

Mr. BROOKS. Has GAO reviewed the inappropriate use of Federal funds for lobbying by grantees and contractors?

Mr. BOWSHER. Yes, we have.

Mr. BROOKS. Does GAO's work in this area provide sufficient basis to justify the drastic change in policy that has been proposed?

Mr. BOWSHER. No, it does not. We have been asked to look into various incidents of possible improper use of Government funds for lobbying and we have cited some incidents where we thought the funds had been improperly used. We have never seen any volume of such improper use that we would propose this kind of change.

Mr. BROOKS. General, last Friday afternoon OMB issued a press release suggesting that the purpose of their draft proposal was to carry out a recommendation made by the Comptroller General. That is you. Specifically, OMB quoted the following language from a GAO report on the use of funds under title X of the Public Health Service Act. They said:

Clear Federal guidance is needed both to insure that title X program funds are not used for lobbying and to preclude unnecessary controversy over whether grantees are violating Federal restrictions. The move to revise and make more specific the cost principles applicable to all Federal grantees is the appropriate mechanism to achieve these ends.

Did you ever intend that recommendation to result in the action that OMB has taken?

Mr. BOWSHER. No, we didn't, Mr. Chairman. What we did intend is what some of the members of your committee and yourself have said today to try to get some consistency in the regulations in the executive branch—as we had cited in that report the difference between the OMB directions and HHS's regulations. But what we were really talking about was cleaning up some cost allocation regulations, you might say, to make it clear and that is all we were talking about, really.

Mr. BROOKS. What steps other than those that have been proposed by the administration could be taken to eliminate abuses of Federal funds to pay for lobbying expenses?

Mr. BOWSHER. Well, I think that the one we just talked about, cleaning up and trying to get some consistency in what is an allowable cost and what isn't, would be good. We also, as you know in that Lockheed situation, ran into a situation that is really not covered by these regulations and that is where the executive branch is working with the private sector to carry on a massive lobbying activity. That would have to probably be cleared up by legislation.

Mr. BROOKS. One last question. Lobbying is not listed in current OMB guidelines as an unallowable expense. If lobbying were specifically listed as unallowable, would auditors be able to determine whether Federal funds are being diverted from legitimate activities to political advocacy?

Mr. BOWSHER. I think auditors can make those kinds of determinations. Sometimes it is imprecise and sometimes the cost accounting systems of the various organizations are not perfect but I know that is what some of the people at OMB were trying to do with

these regulations, was eliminate the need for some basic cost accounting and for the need for auditors to check it out. But by going the route they did, as you can see here today, they have created greater problems and I really think the cost accounting can be there and the auditors can check it out as they have traditionally done. They just need a little more clarification in the guidelines.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

It is nice to have you back with us again. We appreciate your testimony. Is it necessary to have regulations such as the proposal revision to A-122?

Mr. BOWSHER. I think some guidelines like A-122 are desirable, yes, I do.

Mr. HORTON. In a broad way how would you sketch out what is needed?

Mr. BOWSHER. Well, I think just in a broad way is some clarification here as to what's allowable and what isn't. As we pointed out in our title X report some of the funds were sent on to induce payment, we might say, to associations; those kinds of things could be clarified. I think the nonprofits and the corporations in this country would tend to abide by these regulations and they could be checked out by periodic audit. It is a very doable situation and by and large if the regulations were revised in a commonsense and practical manner, I think the organizations would abide by it.

Mr. HORTON. I certainly agree with you that cost of political advocacy should not be financed with taxpayers' funds through charges to Federal contracts or grants. Do you have any idea, maybe just a sort of a rough estimate, of how much is charged actually?

Mr. BOWSHER. No, we have never done a study that we could give you a figure. We have looked at individual situations both on some of our work that we self-initiate and some of the work that the Congress has asked us to look at and we have reported those situations, but we have never done a complete study.

Mr. HORTON. Is a complete study to find that out feasible?

Mr. SOCOLAR. I think it would be very difficult to do a study on the basis of which one could project throughout the whole Government.

Mr. HORTON. How widespread or how deep a problem is it?

Mr. BOWSHER. We do not think it is a deep or widespread problem. In other words, we have found incidents and we have reported those, and as a result asked for some clarification, but we have never found huge sums of money involved that we could report to the Congress.

Mr. HORTON. In addition to your kind of studies, do you think also that the inspectors general efforts could be helpful in this respect?

Mr. BOWSHER. Yes, I do.

Mr. HORTON. How bad is the problem at Defense, compared with the problem with nonprofit grantees and contractors?

Mr. BOWSHER. Well, the Defense issue is somewhat different and is not really covered by the changes in this, although these would have an effect on the Washington offices of the major aerospace contractors. But what we ran into in the Lockheed situation, which

you people raised here this morning, was the executive branch working with the private sector putting forth this major lobbying effort as you point out, costing somewhere around \$500,000, and those are the efforts that are problems as we pointed out when we testified on the Lockheed report that we issued.

Now, these regulations really are only changing the ball game for the private sector. They are not touching at all what the executive branch does in relation to the private sector on a situation like Lockheed which is, I think, something that should eventually be looked at both by the executive—

Mr. HORTON. Is there a need to look at that?

Mr. BOWSHER. Yes there is, as we previously testified.

Mr. HORTON. I think you probably were here when Mr. Wright was testifying about other circulars. I forget the numbers, I think one was 21 and another one related to the State and local governments. Do those circulars get into the same type of problem or the same type of area that Circular A-122 attempted to get into? Are you familiar with that?

Mr. SOCOLAR. Circular 87 gets into it somewhat in connection with prohibiting contributions by State and local governments to organizations that do a substantial amount of lobbying. There is nothing in A-122 at the present time that deals with the subject. If I might comment, our particular concern about the need for regulations in this area stems from the fact that there are several general statutes on the books today and that we are often called upon on a complaint basis to examine particular situations. Because the laws are so general and because there aren't specific regulations delineating what kinds of activities are reimbursable under those laws, we have a rather difficult time drawing the line between permissible and impermissible types of activities. We think it would be helpful not only in terms of going in after the fact to determine what happened, but for the guidance of the particular grantees, contractors, to know beforehand what kinds of costs they should charge to their contracts and grants and what kinds they shouldn't. With that guidance there should not be too great a problem in terms of enforcement.

Mr. HORTON. I assume from what you say that it is better to proceed administratively or through regulation rather than statute.

Mr. BOWSHER. We think that is true, Congressman, on this issue of allowable costs and unallowable costs. We do think that on Lockheed, that you would have to, as Milt has pointed out, go back and look at some of the statutes which tend to conflict.

Mr. HORTON. Thank you, Mr. Chairman.

Mr. BROOKS. Thank you, Mr. Horton. I recognize the gentleman, Mr. Clinger.

Mr. CLINGER. Thank you very much, Mr. Chairman.

Mr. BOWSHER, on page 6 of your statement you suggest that there may be some rare circumstances where it might be appropriate to use tax dollars to pay for political advocacy. Could you elaborate on that?

Mr. BOWSHER. Yes. We only put that in because we didn't feel we could exclude everything and we think it is very rare. One case might be a legal defense corporation where they have a case where in defending or representing their client they would have to be ad-

vocating some position, feeling they would have to come down and talk to somebody here in either the executive branch or in the legislative branch and it would be appropriate and probably should not be excluded. But we really think those are very rare circumstances.

Mr. CLINGER. It is very difficult to define, it would seem to me—

Mr. BOWSHER. Yes, sir.

Mr. CLINGER. How do you write a regulation that could take into account those gray areas?

Mr. SOCOLAR. In point of fact, the legislation covering the Legal Services Corporation specifically provides for that kind of political advocacy. So long as there is a client in whose behalf that kind of activity is required, the act makes very clear that that would be all right.

Mr. CLINGER. I think we all agree that the definition that is contained in the withdrawn A-122 with regard to political advocacy is not a good one and that there need to be some fairly dramatic changes in that definition.

Have you given any thought to what changes might be made that would make political advocacy a more workable concept?

Mr. BOWSHER. Well, what we would like to do, Mr. Congressman, is work with the people at OMB and with your committee, and anyone else in the Congress on that rather than give you a quick answer here today. We would like to work with them on that in the days and weeks ahead.

Mr. CLINGER. Well, perhaps a more specific question. OMB has hinted that it might be considering new language that exempts standard marketing activities from the definition of political advocacy.

Would you have any views on that proposed change?

Mr. SOCOLAR. I think that the posture that we would start from is that any definition of political advocacy would have to assure that legitimate activities, legitimate making of information available would not be cut out by whatever that definition might be. Under the laws as they are on the books now, for example, because they are so general we have taken the view that one really has to step into an area of egregious conduct before we would, as a matter of law, conclude that those statutes have been violated. I think the same kind of care would need to be taken with regard to any definition of political advocacy that would be put forward in a regulation. Our main objection, if you will, to the issuance and to the concept being propounded by OMB is on this issue of nonallocatability of permissible and impermissible costs—that once an individual, for example, engages in political advocacy, no part of his salary may be charged to a grant or a contract irrespective of whatever his contribution to that grant or contract might be. We think that is an impermissible penalty.

Mr. CLINGER. I think clearly the most egregious provision of this regulation—I think the most offensive to the most number of people and with regard to that concept—is that of disallowing the full salary cost of any part of an individual's activity engaged in political advocacy. How would you see that kind of principle apply-

ing to equipment, for example? If any portion of Federal grant money is used to purchase a telephone or a Xerox machine—

Mr. BOWSHER. We would have the same problem.

Mr. CLINGER. That equipment be used for political activities?

Mr. BOWSHER. Yes. In other words, we just don't think you should wipe it all out at least on that one action—

Mr. CLINGER. Yes. You get into very, very difficult areas. You buy a bus to transport people and they are transported to some political event, do you disallow the whole cost? That sort of thing.

OK. Well, I think that clarifies my question. Thank you, Mr. Chairman.

Mr. BROOKS. Thank you both very much. I appreciate your coming down, General.

Mr. BOWSHER. Thank you very much.

Mr. BROOKS. This morning we have from the Government Operations Committee a colleague, Congressman Barney Frank, from the Fourth District of Massachusetts. He is serving his second term in Congress after a distinguished career in the Massachusetts Legislature. He has a BA and a JD from Harvard University, has been a teaching fellow in government at Harvard, and was a graduate student in political science.

At the beginning of this Congress, he was elected chairman of our Manpower and Housing Subcommittee and we are expecting to see the vigorous and diligent work from him as a subcommittee chairman that has characterized his entire political career.

STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. FRANK. Thank you Mr. Chairman. I will be very brief and I appreciate the opportunity because there are a number of people here who can document what is happening. I want to express my appreciation to you for having this hearing. Obviously there has been a great deal of unhappiness about this proposal and it is very important that you have provided this channel for it to be voiced.

What bothers me in addition to the specifics about this is the basic thrust of it. In other words, I think it is a bad idea being badly executed. Improving the execution will not cure the fact that it is a bad idea.

What we fundamentally have are people in the executive branch who want the American people to leave them alone. I was struck on reading Mr. Wright's testimony that apparently one of his modifications is going to be that it will be all right for people to talk to the executive branch but not to talk to Congress because they don't want interference with what they are planning to do.

I am offended by the whole notion that seems to me to be motivating this proposal that there is something improper about citizens speaking out about public policy and I think that really is the motivation. I think we have people in the executive branch who want to make fundamental changes and they don't want to be bothered by a lot of people who are going to tell us what the effects of those changes are. I do not understand how it could have occurred to them that it was appropriate for the Federal Government

to say to the American people you may not speak out on these issues.

It is particularly ironic that an administration which has stressed, correctly, that tax dollars are not the property of the Federal Government but are in fact something which belongs to the people are now acting as if by providing funds for various legally sanctioned activities, they are doing people an enormous favor for which the people must pay by shutting up.

We are not talking about a Federal Government dipping into the pockets of its own appointees and going out and distributing largess to which people should be quietly grateful. We are talking about legally sanctioned activities whereby the Congress has told the executive branch various activities should be funded. To say that the recipients of those funds who are carrying out sanctioned public purposes are somehow behaving improperly if they talk about how they could be better used, seems to me to be bizarre.

I would also add that if they were going to enforce this, I would have some questions in particular about an inconsistency. It does seem to me that John was right when he said that Government ought to have laws of a democracy which apply not just to the private citizens, but to the people in Government themselves.

Now, I don't know exactly who pays what at the White House. I do know there are people at the White House, Mr. Nofziger and now Mr. Rollins, whose job does not seem to me to be by any stretch of the imagination governmental. They are over there in the White House and maybe they are paying for those phones privately and the Xerox machines privately, but it was my understanding that they have been in the White House not just in this administration, but in prior administrations, people whose job it is to get political.

Now, I have no particular objection to the fact that Mr. Rollins spent a certain part of his time on the Government payroll figuring out how to defeat me for reelection; if I were he, I would have done the same thing. What I object to is his administration deciding that while it was perfectly legitimate for him and Mr. Nofziger and their staffs to be paid wholly out of Government funds on Government property over there in the Executive Office Building, to be engaged in political activity, but that it is somehow improper for citizens who are going about their legal business to do the same thing.

So I would hope that this circular is not only withdrawn, but is sent back to whatever nook and cranny it came from and I think what we have, Mr. Chairman, is very simply an effort by this administration to appease some of its particular rightwing constituents by defunding the left. The fact that they have to get Lockheed, Boeing and a few others, I think, is only a minor inconvenience because they think they can figure out some ways around it. It is not an appropriate response for the Federal Government to act as if it is the executive branch's money, that the recipients ought to be seen and not heard. The whole thrust of this is to interfere, it seems to me, with the kind of vigorous debate that I would have thought we would have been proud of in a democracy.

I congratulate you for holding a hearing and I am glad that they have withdrawn the first attempt and I hope they will do the sensi-

ble thing and stop wasting all of our time and just let us all go about our business.

The final thing I would say is that there is a disturbing trend here that we see because people admit there are rules and regulations on the books. This is not simply an effort to make them uniform. What they are saying is it is too hard to enforce the specific rules so let's punish everybody. We have seen too much of that as a governmental response. It is easy to say there have been problems in the student loan program; let's cut off whole groups of people. There have been problems in this program or that program, let's cut off whole groups of people. Instead of doing what they ought to be doing, which is enforcing the existing rules on the books, they say that is too hard, let's just cut off everybody. That kind of mass punishment has bothered me since I was in the second grade and the teacher punished the whole class because one kid yelled when she wasn't looking. I don't think it is any more appropriate now and I think from the standpoint of the first amendment and a respect for the democratic process, they ought to withdraw the whole thing.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you very much, Mr. Frank.

Our next witness is Brian O'Connell, president of the Independent Sector. Previously, he served as president of the National Council on Philanthropy and executive director of the Coalition of National Voluntary Organizations. For 12 years Mr. O'Connell was national director of the Mental Health Association. Prior to that he spent 12 years with the American Heart Association.

He is a graduate of Tufts, did his graduate work at the Maxwell School of Citizenship and Public Administration at Syracuse.

He is obviously a man who has spent his lifetime trying to help others. We are delighted to have you here, Mr. O'Connell.

STATEMENT OF BRIAN O'CONNELL, PRESIDENT, INDEPENDENT SECTOR

Mr. O'CONNELL. Thank you, Mr. Chairman.

I confess that the testimony by the Comptroller General was so revealing that I momentarily don't have complete control. I wish I did and I will explain that if you will bear with me.

First of all, I would like to be able to submit the entire testimony for the record.

Mr. BROOKS. Without objection. The gentleman will proceed.

Mr. O'CONNELL. I've spent 30 years in this voluntary philanthropic sector and have never known so total an impugning of the integrity of all of its institutions. For 3 weeks I have been trying to find out what the facts are and where in the world this rampant disregard for the law exists. I have not seen it in those 30 years. I have been told repeatedly by the Office of Management and Budget that the excesses are egregious and that when the GAO revealed its report, I would be ashamed, and that was the word used, I would be ashamed that I try to represent voluntary and philanthropic institutions. Repeatedly I have tried to get that report and GAO said they knew of no such report, OMB said it may not have been released yet, "but wait until you see it, you will be embar-

rassed, chagrined; you will go back with your tail between your legs."

I finally got ahold of the report that was referred to twice earlier this morning. It does not deal with this entire sector. This so-called scathing report is an innocuous report dealing only with family planning and as the Comptroller General himself has just revealed, even when they looked at that narrow, certainly politically active segment, they found very few problems.

So here we have a campaign that has been now waged for a month that says this sector that I care passionately about, and you do, sir, has been in rampant disregard of the law. In today's New York Times, Mr. Horowitz, who is still speaking out, says "The budget office moved for tighter regulations because there were rampant abuses of existing rules against Federal money for lobbying activities."

This small innocuous GAO report is the basis of all of his statements and the Comptroller General who issued this report just said to you twice, that as far as he is concerned, they do not believe that significant excesses exist. Now, I think it is absolutely shameful that this or any administration should willy-nilly float these balloons as they were described, that so totally undermine the public confidence in a sector that the President and all of us care terribly about.

I have, with Barber Conable and others, attempted to work with OMB to say "What adjustments can we make in the current accounting system?" and have been told that GAO and all who have looked at it said that it is totally impossible to take the current accounting and auditing mechanisms and make them work. We have just heard here for the first time, in answer to Mr. Horton's question, in answer also to Mr. Clinger's points, that the current accounting and auditing mechanisms can work and do work. We have also heard that if there are egregious violations of the law, whether it is Lockheed or any voluntary group, the administration, the Government should move steadfastly into those abuses. I object, as Mr. Frank clearly does, to this across-the-board attack on the integrity of volunteers, of givers, voluntary institutions and philanthropic groups. They are not simply talking about organizations that one or more of us might have some questions about in terms of honest disagreements about their program goals. They are talking about the Foreign Policy Association on issues of disarmament, the National Wildlife Federation on endangered species and lands, the American Enterprise Institute on its health care studies, the American Red Cross on disaster relief, Goodwill Industries on the sheltered workshops, the Baptist Church on homes of the aged, Jewish Federations on social services, the American Museum Association on national endowment of the arts, Catholic Charities on refugees and the homeless.

Almost every hospital, church denomination, social service agency, research institute, historical society, is impacted heavily by these proposed changes.

I am told and I am not a lawyer so I wanted to be absolutely sure of my grounds before speaking here or elsewhere, I am told by constitutional lawyers that the proposals are clearly unconstitutional on two grounds: That OMB has gone beyond its statutory limits in

making law through regulations rather than clarifying law, and that on first amendment rights it is clearly unconstitutional.

I will further say that to Mr. Wright's testimony and I respect him as an individual, I am outraged that on the basis of what I have now learned about the GAO's report and the GAO's opinion about how this should be dealt with, that they want to proceed and in just 2 weeks come forward with revised proposals. I think during that period they will continue to give the impression that voluntary institutions are in violation of the law, and they will continue to say there are rampant violations of the law by organizations. I think it is all the more argument why they should withdraw.

I think it is important to your understanding of my attempt to look at this in a balanced way, that my organization has for the past 18 months been trying to back off so-called liberal organizations that want to get at the Moral Majority and other conservative electronic evangelical churches because these liberal groups feel that the churches have had undue influence in the electoral process.

I have been attempting to say there are enough laws on the books now that we don't need more laws to protect us from the left or the right. Most important is the constitutional protections of freedoms of speech and assembly. Let's not start closing in on one another because we don't like what Planned Parenthood does or we don't like what the Moral Majority does.

I have also worked hard with this administration for 2 years on its private sector initiatives project. My timesheet shows that during the first year of that activity I spent almost a third of my time working with the President and the administration applauding, and encouraging their attempts to strengthen private sector initiatives, voluntary activity, private giving. I have been facing many organizations who were skeptical and cynical. I continue to feel that it is important for all of us who care about voluntary initiative to work with any President who wants to encourage that kind of behavior but I do say it is time that this President stepped in to strengthen the organizations, that are the vehicles through which the country's voluntary impulse has always been pursued.

Thank you.

[Mr. O'Connell's prepared statement follows:]

Testimony of Brian O'Connell Before the House Subcommittee on
Legislation and National Security

I am Brian O'Connell, president of INDEPENDENT SECTOR, an organization of 466 national foundations, voluntary organizations, and business corporations that have significant contributions programs. (The list is attached.) These groups have joined together in INDEPENDENT SECTOR to strengthen our national tradition of giving, volunteering and not-for-profit initiative. The organizations are as different as American Heart Association, United Negro College Fund, The Rockefeller Foundation, National Council of Churches, Shell Oil Companies Foundation, American Association of Museums, The General Mills Foundation, National Council of La Raza, Planned Parenthood and Catholic Charities. The common denominator among this diverse mix is their shared determination that people will have greater opportunity to influence their own lives and the kind of society in which they live.

For two years I have applauded and worked with President Reagan's efforts to strengthen the country's voluntary impulse. Simultaneously I have criticized the Administration's budget cuts that disproportionately impact voluntary organizations and the people they serve even while the Administration has called on these groups to substitute for reduced government services.

At the heart of that dilemma was the Administration's failure to recognize that for twenty-five years the Federal government has preferred to fulfill many of its responsibilities by contracting with voluntary organizations rather than build its own hospitals, day care centers, and homes for the aged. Today one-third of the income of the voluntary sector comes from government grants, contracts and payments for service. (The other two-thirds comes in

approximately equal proportions from contributions and user fees such as tuition.) Within this financial reality, it is not practical or fair to cut the one-third share of support for sheltered workshops and job training programs run by voluntary organizations, and then leave the impression that these voluntary groups will absorb cutbacks in government-run programs. This awful crunch is compounded by the human response of governmental bureaus to pass along to voluntary organizations the larger proportion of mandated cuts. It's much easier to reduce the line item for external contracts than to fire people around you.

In the face of these disproportionate cuts and unrealistic expectations, many leaders on the voluntary side have become skeptical, if not cynical, about the President's interest.

Against this uneasy backdrop, the Administration has now proposed a fuller change in relationships that would substantially reduce the capacity of voluntary organizations to be of public service -- and with this stroke they have changed the skepticism and cynicism to bewilderment and hostility. The Administration's new proposals (OMB Circular A-122, January 24, 1983) will mean that a voluntary organization that receives any government money will lose its right to influence that government. Simultaneously they propose to greatly broaden the list of prohibited activities to include any contacts with legislatures, elected officials, administrators, regulatory boards and courts. The purpose of these proposals is to come up with a new way to be sure that tax dollars are not used to finance political activity which is already illegal, but their plan is frightening.

The Administration argues that the only way an organization should retain its right to provide services, and also engage in advocacy, is by establishing separate offices, staff and equipment for each. For example (and the Office of Management and Budget has acknowledged to me that this example is valid), a voluntary organization that receives only 5 percent of its total budget from a government program grant and devotes only 5 percent of its time to advocacy efforts would not be allowed to have its staff director, office or equipment used for both parts of the program, even though no part of the government grant is assigned to advocacy.

Here are three examples of how sweeping and stifling these proposals are.

1. For the small voluntary organization -- and these are the majority -- the regulations are totally unworkable. The proposed regulations would require that a current one person organization would have to have two separate persons and offices or lose either the federal grant or its advocacy rights. Many small and mid-sized voluntary organizations accept government funding at the urgent behest of government, which has seen that these voluntary groups are already working with people about whom the government has become concerned and because the government does not want to expand its own direct operations. It is unreasonable and shortsighted that an organization that agrees to help government train handicapped workers cannot use any proportion of the same staff, office or equipment to perform those services if those same people or facilities are even minimally engaged -- with contributed income -- in trying to work with government to improve the overall system of services for the handicapped. It is simply not practical to expect that small organizations can divide and fund both functions.

2. Even in a larger organization, it is not possible for the executive director to divorce himself or herself from one side of the operation. If he or she is the chief staff officer, then he or she is responsible for all the important pursuits of that organization. Even if they could afford two separate staffs and offices, executive directors wouldn't be worth their salt if in any significant proportion of their activities they have to disqualify themselves.

When the government comes to the voluntary organization requesting help with certain public services, or when the voluntary organization seeks to perform services, the government usually requires that a proportion of the executive's time be assigned to the project. This is a measure of assurance that the project is viewed as that important and will get that level of attention. It is utterly unfair and unrealistic to require that the executive director disqualify himself or herself on either the direct service or the advocacy side.

During the past year, President Reagan has quite appropriately applauded the New York City Partnership. I wonder if he read the New York Times story Friday, February 4, in which it was pointed out that the Partnership's income includes "millions of dollars in federal money" and, separately, that "its lobbying has been effective". The story also indicates that its first full-time executive director, Frank Macchiarola, will soon be on board. Can the Administration really believe that Mr. Macchiarola will not be involved on all sides of the program?

3. Most voluntary organizations cannot possibly be on just one side or the other. An Administration representative shouted at me that it is wrong

for an organization that delivers food to the poor to also try to influence the food stamp program. Taking it to a hopefully less charged example, I pointed out that in the past five or six years the government has come to voluntary groups with an almost desperate plea for help in dealing with the de-institutionalization of mental hospital patients who have been put on the street without any arrangements for their health, employment, housing, financial and other pressing needs. Many voluntary mental health facilities have responded beautifully. It is inconceivable that the Administration should require that those who run these halfway houses or other community services must not work with government to help develop the comprehensive mental health services that in the end will provide for both early discharge and orderly community follow through.

A good agency that works closely with human beings is often in the best position to work constructively with government to develop the laws, regulations and programs appropriate for the people that both sides care about. It is naive in the extreme for the Administration to assume that a voluntary organization that cares deeply about housing, jobs, health, museums, or refugees won't have to be on both sides of the fence, or that the executive must decide which side he or she will guarantee to stay away from. It would have been unconscionable during the refugee crisis for the government to say to the Catholic Relief Agency, "For God's sake, help us solve this problem, but because we're going to underwrite part of your help, don't you dare use any of your contributed income to try to influence how this program is conceived, legislated, organized or operated."

Voluntary organizations are already prohibited from using any part of a grant or contract for political or lobbying activities. To retain their tax exempt

status, they also cannot use any contributed funds for political activity and they must observe very strict limitations on advocacy efforts. These are monitored by accounting and auditing systems which all concerned are constantly struggling to improve. These systems are still imperfect, but it is better to struggle to improve them than to impose a crippling simplicity that would deny government the combination of services and opinions it needs. The Administrations's proposals are not only unworkable, but fundamentally wrong.

It's time the President stepped in to strengthen the organizations that are the vehicles through which the country's voluntary impulse is pursued.

INDEPENDENT SECTOR VOTING MEMBERS
(As of March 1, 1983)

Action for Children's Television (ACT)	American Farmland Trust
Aetna Life and Casualty Company	American Heart Association
African Wildlife Leadership Foundation, Inc.	American Hospital Association
Agudath Israel of America	American Kidney Fund
Aid Association for Lutherans	American Leadership Forum
Alcoa Foundation	American Lung Association
Alliance of Independent Colleges of Art	American Protestant Hospital Association
Alliance to Save Energy	American Red Cross
American Arts Alliance	American Social Health Association
American Assembly	American Speech-Language-Hearing Association
American Association for the Advancement of Science	American Standard Foundation
American Association for Higher Education	American Symphony Orchestra League
American Association of Fund-Raising Counsel, Inc.	American Telephone and Telegraph
American Association of Homes for the Aging	American Theatre Association
American Association of Museums	Americans for Indian Opportunity
American Association of Retired Persons	Appalachian Mountain Club
American Association of University Women	Armco Foundation
American Bar Association	Arrow, Inc.
American Can Company Foundation	Art Museum Association
American Cancer Society	Aspen Institute for Humanistic Studies
American Citizens Concerned for Life	Aspira of America, Inc.
American Council for the Arts	Association for International Practical Training
American Council of Voluntary Agencies for Foreign Service	Association for Volunteer Administration
American Diabetes Association	Association of Art Museum Directors
American Enterprise Institute for Public Policy Research	Association of Black Foundation Executives, Inc.
American Express Foundation	Association of College, University and Community Arts Administrators, Inc.
	Association of Governing Boards of Universities and Colleges

Association of Jesuit Colleges
 and Universities
 Association of Junior Leagues,
 Inc.
 Association of Science Technology
 Centers
 Association of Voluntary Action
 Scholars
 Association of Volunteer Bureaus
 Atlantic Richfield Foundation
 Avon Products, Inc.
 Mary Reynolds Babcock Foundation
 BankAmerica Foundation
 Bankers Trust Company
 Benton Foundation
 Bethlehem Steel Corporation
 Bird Companies Charitable
 Foundation, Inc.
 Blue Cross & Blue Shield
 Associations
 B'nai B'rith International
 Borden Foundation
 Boy Scouts of America
 Boys Clubs of America
 Bread for the World Educational
 Fund, Inc.
 Bristol-Myers Company
 Brookings Institution
 Burlington Northern Foundation
 Burroughs Corporation
 Business and Professional Women's
 Foundation
 Business Committee for the Arts,
 Inc.
 California Community Foundation
 Call for Action, Inc.
 Camp Fire, Inc.
 Cancer Care, Inc. and The
 National Cancer Foundation,
 Inc.
 Carnegie Corporation of New York
 Carter Hawley Hale Stores, Inc.
 Catalyst
 Caterpillar Foundation
 CBS Inc.
 Center for Citizenship Education
 Center for Corporate Public
 Involvement
 Center for Responsive Governance
 Champion International
 Chase Manhattan Bank, N.A.
 Chemical Bank
 Chevron U.S.A., Inc.
 Children's Aid International
 Christian Ministries Management
 Association
 CIGNA Corporation
 Citibank, N.A.
 Citizen's Scholarship Foundation
 of America, Inc.
 Cleveland Foundation
 Clorox Company Foundation
 Close Up Foundation
 Coca-Cola Company
 CODEL, Inc.
 College Board
 Colonial Williamsburg Foundation
 Colt Industries Inc.
 Columbus Foundation
 Committee for Corporate Support
 of Private Universities, Inc.
 Committee for the Study of
 Handgun Misuse
 Committee to Combat Huntington's
 Disease, Inc.
 Commonwealth Fund
 Conoco, Inc.
 Conservation Foundation
 Consolidated Natural Gas
 Company
 Consortium for International
 Citizen Exchange
 Continental Bank Foundation
 Continental Group Foundation,
 Inc.
 Corning Glass Works Foundation
 Coro Foundation
 Corporation for Enterprise
 Development
 Council for the Advancement and
 Support of Education
 Council for the Advancement of
 Citizenship
 Council for American Private
 Education
 Council for Financial Aid to
 Education
 Council of Better Business
 Bureaus/Philanthropic Advisory
 Service Division
 Council of Engineering and
 Scientific Society Executives
 Council of Independent Colleges
 Council of Jewish Federations
 Council on Foundations
 Council on International and
 Public Affairs
 CPC International, Inc.

Brown Zellerbach Foundation
 Drum and Forster Foundation
 Cummins Engine Company, Inc.
 Charles A. Dana Foundation, Inc.
 Dart & Kraft, Inc.
 Dayton Hudson Corporation
 Deere and Company
 Deloitte Haskins & Sells
 Geraldine R. Dodge Foundation
 Jaylord Donnelley Foundation
 Dresser Industries, Inc.
 Brown Foundation
 Duke Endowment
 E.I. Du Pont de Nemours and
 Company
 Durfee Foundation
 Dyson Foundation
 Eastman Kodak Company
 Eaton Corporation
 Educational Testing Service
 Emerson Electric Company
 Energy Conservation Coalition
 Enterprise Foundation
 Environmental Law Institute
 Epilepsy Foundation of America
 Equitable Life Assurance Society
 of the United States
 Esmark, Inc. Foundation
 Evangelical Council for Financial
 Accountability
 Exxon Corporation
 Family Service Association of
 America
 Federated Department Stores, Inc.
 Foundation
 Fireman's Fund Insurance Company
 Foundation
 Fluor Corporation
 Ford Foundation
 Ford Motor Company Fund
 Foremost-McKesson Foundation,
 Inc.
 Foundation Center
 Foundation for Children with
 Learning Disabilities
 Foundation for Teaching Economics
 Fresh Air Fund
 Future Homemakers of America
 Gannett Foundation
 General Conference of Seventh-day
 Adventists
 General Electric Company
 General Mills Foundation
 General Motors Foundation

General Telephone & Electronics
 Girl Scouts of the U.S.A.
 Girls Clubs of America, Inc.
 Morris Goldseker Foundation
 of Maryland, Inc.
 Goodwill Industries of America
 Grace Foundation, Inc.
 William T. Grant Foundation
 Grotto Foundation
 Gulf Oil Corporation
 Gulf + Western Foundation
 George Gund Foundation
 Miriam and Peter Haas Fund
 Walter and Elise Haas Fund
 Hallmark Cards, Inc.
 Hawaiian Foundation
 Edward W. Hazen Foundation
 H.J. Heinz Company Foundation
 Heublein Foundation, Inc.
 William and Flora Hewlett
 Foundation
 Hewlett-Packard Company
 Foundation
 Hoffmann-LaRoche Foundation
 Hogg Foundation for Mental Health
 Hospital Research and Educational
 Trust
 Hunt Foundation
 IBM Corporation
 Independent College Funds of
 America, Inc.
 Independent Research Libraries
 Association
 Inland Steel-Ryerson Foundation,
 Inc.
 Institute for Journalism
 Education
 International Christian Youth
 Exchange
 International Service Agencies
 International Telephone and
 Telegraph
 International Women's Health
 Coalition
 Interracial Council for Business
 Opportunity
 James Irvine Foundation
 Irving Trust Company
 Ittleson Foundation
 Jerome Foundation
 JWB
 Robert Wood Johnson Foundation
 Johnson & Johnson
 Joint Action in Community Service

Joint Center for Political
 Studies
 Jostens Foundation, Inc.
 Joyce Foundation
 Henry J. Kaiser Family Foundation
 W.K. Kellogg Foundation
 Charles F. Kettering Foundation
 Esther A. and Joseph Klingenstein
 Fund, Inc.
 Kresge Foundation
 Samuel H. Kress Foundation
 Albert Kunstadter Family
 Foundation
 LEAD Program in Business, Inc.
 League of Women Voters Education
 Fund
 Leukemia Society of America, Inc.
 Eli Lilly and Company
 Lilly Endowment, Inc.
 Henry Luce Foundation
 Lutheran Brotherhood Foundation
 Lutheran Council in the U.S.A.
 Lutheran Resources Commission -
 Washington
 Lyndhurst Foundation
 J. Roderick MacArthur Foundation
 John D. and Catherine T.
 MacArthur Foundation
 March of Dimes Birth Defects
 Foundation
 John and Mary R. Markle
 Foundation
 May Department Stores Company
 Louis B. Mayer Foundation
 Robert R. McCormick Charitable
 Trust
 McDonald's Corporation
 McDonnell Douglas Corporation
 McGraw-Hill Foundation
 Mellon Bank Foundation
 Merck Company Foundation
 Joyce Mertz-Gilmore Foundation
 Metropolitan Life Foundation
 Mexican-American Legal Defense
 and Educational Fund
 Eugene and Agnes E. Meyer
 Foundation
 John Milton Society for the Blind
 Minneapolis Foundation
 Mobil Oil Corporation
 Monsanto Company
 Philip Morris, Inc.
 Charles Stewart Mott Foundation
 Stewart R. Mott Charitable Trust
 Ms. Foundation for Women
 Mutual Benefit Life
 NAACP Legal Defense and
 Educational Fund, Inc.
 National Academy of Public
 Administration
 National Alliance for the
 Mentally Ill
 National Alliance for Optional
 Parenthood
 National Alliance of Business
 National ALS Foundation, Inc.
 National American Indian Court
 Judges Association
 National Assembly of Community
 Arts Agencies
 National Assembly of National
 Voluntary Health and Social
 Welfare Organizations, Inc.
 National Assembly of State Arts
 Agencies
 National Association for
 Bilingual Education
 National Association for Hispanic
 Elderly
 National Association for Hospital
 Development
 National Association for Visually
 Handicapped
 National Association of
 Independent Colleges and
 Universities
 National Association of
 Independent Schools
 National Association of Public
 Television Stations
 National Association of Schools
 of Art and Design
 National Association of Schools
 of Music
 National Association of Social
 Workers
 National Association on Drug
 Abuse Problems
 National Audubon Society
 National Black Media Coalition
 National Black Programming
 Consortium, Inc.
 National Board of Young Men's
 Christian Associations
 National Board of the Young
 Women's Christian Association
 of the U.S.A.
 National Catholic Development
 Conference, Inc.

National Center for a Barrier
 Free Environment
 National Coalition of Hispanic
 Mental Health and Human
 Services Organizations
 (COSSMHO)
 National Committee for Citizens
 in Education
 National Committee for the
 Prevention of Child Abuse
 National Concilio of America
 National Conference of Catholic
 Charities
 National Congress for Economic
 Development
 National Congress of American
 Indians
 National Consumers League, Inc.
 National Corporate Fund for Dance
 National Council for Children and
 Television
 National Council of La Raza
 National Council of the Churches
 of Christ in the U.S.A.
 National Council of Women of the
 United States, Inc.
 National Council on Alcoholism
 National Easter Seal Society,
 Inc.
 National Economic Development and
 Law Center
 National Executive Service
 Corps.
 National Family Planning and
 Reproductive Health
 Association, Inc.
 National Federation of State
 Humanities Councils
 National 4-H Council
 National Fund for Medical
 Education
 National Future Farmers of
 America, Inc.
 National Health Council, Inc.
 National Hispanic Scholarship
 Fund
 National Hospice Organization
 National Image, Inc.
 National Indian Youth Council
 National Information Bureau, Inc.
 National Legal Aid and Defender
 Association
 National Medical Fellowships,
 Inc.

National Mental Health
 Association
 National Opera Institute
 National Park Foundation
 National Parks and Conservation
 Association
 National Public Radio
 National Puerto Rican Coalition
 National Puerto Rican Forum, Inc.
 National Scholarship Service and
 Fund for Negro Students, Inc.
 National School Volunteer
 Program, Inc.
 National Society for Autistic
 Children
 National Society of Fund Raising
 Executives
 National Society to Prevent
 Blindness
 National Tribal Chairmen's
 Association
 National Trust for Historic
 Preservation
 National Urban Coalition
 National Urban Fellows, Inc.
 National Urban League, Inc.
 National Wildlife Federation
 National Youth Work Alliance,
 Inc.
 Native American Rights Fund
 Natomas Company
 Nature Conservancy
 Neighborhood Coalition
 New England Mutual Life Insurance
 Company
 New World Foundation
 New York Community Trust
 New York Life Foundation
 New York Times Company Foundation
 Inc.
 NL Industries Foundation, Inc.
 Nordson Foundation
 Northwest Area Foundation
 NOW Legal Defense and Education
 Fund
 Older Women's League
 Olin Corporation
 Opera America
 Organization of Chinese American
 Women
 Organization of Chinese Americans
 Owens-Illinois, Inc.
 Oxfam America, Inc.
 David and Lucile Packard
 Foundation

Parents Anonymous
 Parents Without Partners
 Partners for Livable Places
 J.C. Penney Company, Inc.
 People-to-People Health
 Foundation, Inc. (Project HOPE)
 Pepsico Foundation, Inc..
 Permanent Charities Committee of
 the Entertainment Industries
 Permanent Charity Fund of Boston
 Petro-Lewis Corporation
 Pfizer Foundation, Inc.
 Phillips Petroleum Company
 Piton Foundation
 Planned Parenthood Federation of
 America, Inc.
 Polaroid Foundation, Inc.
 Population Crisis Committee/
 Draper Fund
 Population Resource Center
 Premier Industrial Foundation
 Private Agencies in International
 Development
 Procter and Gamble Fund
 Project Orbis, Inc.
 Prudential Foundation
 Puerto Rican Legal Defense &
 Education Fund, Inc.
 RCA Corporation
 Reader's Digest Association, Inc.
 Reading is Fundamental, Inc.
 Reinberger Foundation
 Republic Steel Corporation
 Charles H. Revson Foundation
 R.J. Reynolds Industries, Inc.
 Rockefeller Brothers Fund
 Rockefeller Family Fund
 Rockefeller Foundation
 Rockwell International
 Corporation Trust
 Rosenberg Foundation
 Samuel Rubin Foundation
 Safeco Insurance Companies
 Russell Sage Foundation
 Saint Paul Foundation
 Salvation Army
 San Francisco Foundation
 Save the Children
 Schering-Plough Corporation
 Dr. Scholl Foundation
 Sears, Roebuck and Co.
 Shell Companies Foundation, Inc.
 Sherwin-Williams Company
 Lois and Samuel Silberman Fund
 Alfred P. Sloan Foundation
 Spencer Foundation
 Spring Hill Center
 Standard Oil Company (Ohio)
 W. Clement and Jessie V. Stone
 Foundation
 Levi Strauss Foundation
 Student Conservation Association,
 Inc.

Sun Company, Inc.
 Support Center
 Syntex (U.S.A.), Inc.
 Taconic Foundation, Inc.
 Tandy Corporation
 Teachers Insurance and Annuity
 Association of America/College
 Retirement Equities Fund
 (TIAA-CREF)
 Telecommunications Cooperative
 Network
 Tenneco Inc.
 Texaco Inc.
 Textron, Inc.
 3M Company
 Time Inc.
 Times Mirror Foundation
 Tosco Corporation
 Transamerica Corporation
 Travelers Insurance Companies
 Trebor Foundation
 Trilateral Commission
 Trout Unlimited
 Trust for Public Land
 TRW, Inc.
 Union Carbide Corporation
 Union Pacific Foundation
 United Jewish Appeal
 United Negro College Fund
 United Parcel Service of
 America, Inc.
 United States Catholic Conference
 United States Committee for
 UNICEF
 United States Olympic Committee
 United States Steel Foundation,
 Inc.
 United Way of America
 Urban Institute
 Urban Investment and Development
 Company
 van Ameringen Foundation
 VOLUNTEER: The National Center
 for Citizen Involvement
 Volunteers of America
 Wain Foundation
 Izaak Walton League of America
 Warner Communications, Inc.
 Eloise and Richard Webber
 Foundation
 Weingart Foundation
 Westinghouse Electric Corporation
 Weyerhaeuser Foundation
 Women and Foundations/Corporate
 Philanthropy
 Women in Community Service, Inc.
 Women's Action Alliance, Inc.
 Women's Sports Foundation
 World Crafts Council
 World Neighbors
 Xerox Corporation

Mr. BROOKS. I want to thank you very much for an excellent statement. I read your statement last night and I thought it was good. I also think your statement here today was exceptional.

I have just one question for you.

How extensively would these proposed revisions affect nonprofit organizations?

Mr. O'CONNELL. So extensive as to be devastating, that it would affect groups as research oriented, and conservatively identified as the American Enterprise Institute, it would affect the American Red Cross, as it attempts to deal with the Government on disaster relief, it would affect the Baptist Church as it struggles with homes for the aged. It would impact so many voluntary institutions and the people they serve as to be an unconscionable encroachment on the efforts of both Government and private organizations to be of public service.

Mr. BROOKS. Thank you. Any questions; Mr. Horton?

Mr. HORTON. I don't have any questions, thank you.

Mr. BROOKS. Mr. Clinger.

Mr. CLINGER. Thank you, Mr. Chairman. I just have one question. What do you feel about registered lobbyists? Should any portion of their funds in your view be permitted to be paid by Federal funds?

Mr. O'CONNELL. Not unless the grant under which they are operating specifically makes that permission, that is, we are not arguing that Government funds should be used for lobbying. We do argue strongly that advocacy goes far beyond lobbying and that most voluntary institutions with their contributed money should be allowed to represent citizen concerns and clearly our whole democratic process is to give people access, to have some empowerment, to have some influence. If that is through a paid lobbyist, and they want to do that through their contributed money, that is a legitimate expense, but I would agree that it should not be part of the grant or contract.

Mr. CLINGER. Thank you.

Mr. BROOKS. Thank you again, sir, for your time and patience.

Our next witness this morning is Mildred H. Shanley, of Brooklyn, N.Y., representing the National Conference of Catholic Charities. She is a graduate of St. John's Law School in Brooklyn, and has worked for Catholic Charities for 22 years.

She is chairman of the National Conference of Catholic Charities' Legislative Committee, a member of the American Bar Association's Family Law Section, a member of the Catholic Lawyers Group in Brooklyn and in Queens and serves on the board of a number of local volunteer organizations.

Ms. Shanley, we are delighted to have you here and you may summarize your statement, if you see fit.

STATEMENT OF MILDRED SHANLEY, STAFF COUNSEL, CATHOLIC CHARITIES OF THE DIOCESE OF BROOKLYN

Ms. SHANLEY. Thank you very much. We did submit a written statement which we would like included in the record, if that's possible.

Mr. BROOKS. Without objection, it will be done, and thank you, it is a good one.

Ms. SHANLEY. Thank you. We enjoy the freedom of testifying today on OMB Circular A-122 as we have enjoyed in the past bringing various concerns before Congress for their consideration. We seriously object that this circular could curtail such opportunities in the future. We fully concur that Federal funds should not be used to influence legislation or to engage in advocacy contrary to the legislative intent of authorizing legislation, and I think we have an example in the Older Americans Act where the act itself encourages client representation and advocacy for entitlements of the seniors.

But even beyond this, we do engage in advocacy often on the State level in terms of securing laws which are faithful to the congressional intent of Federal enactments. And I point out as an example being sure that COLA increases in the supplemental security income benefits be passed through to recipients in a State like New York, rather than be used to write off supplemental State payments which are made. We also engage in advocacy on the Federal level, and most recently we were very involved in the terms and conditions that were contained in the Child Welfare and Adoption Subsidy Act. The purpose was to try to form Federal policies so as to encourage State practices which fall to the best interests of children.

We have also engaged in testimony on the Social Security Act, on the food stamp program, on the food commodities bill, and over the years on the various forms which the welfare programs have taken. We engage in these activities without any improper use of Federal funds and in conformity with IRS regulations governing political or partisan activity and substantial legislative restrictions. We do not engage in elective politics and we have conformed with IRS regulations on voter education so as not to indirectly influence the elective process. Our legislative activities are clearly within the IRS substantiality limitations.

This proposal is most objectionable to us in that it restricts the use of our own property and our own funding to avoid what may appear to some as Federal support for particular positions in public debate. We find this to be an unreasonable limitation and one of questionable constitutionality. We raise this clearly in terms of our own protected freedom of speech and right to petition and also in terms of an unjust and unreasonable control on the use of private property.

We are unaware of any instances of improper use of Federal funds for political activities in the nonprofit sector. If in fact there are such inappropriate uses, we would be glad to cooperate in any reforms growing out of such abuse.

There is overreaching, however, when the declared intent of regulation is to avoid apparent, as distinct from real, abuse through the control of the use of private, as distinct from public, funds in activities which we have been taught are a fundamental constitutional right. We believe we are a vital part of American society and we have committed ourselves not only to alleviate the suffering of the poor through almsgiving, but also to work for justice in the interest of the common good. We cherish the freedoms this country

assures its citizens and citizen groups. We therefore implore you to do whatever is possible to assure the withdrawal of the proposed amendments to Circular A-122. Thank you.

[Ms. Shanley's prepared statement follows:]

TESTIMONY OF
MILDRED SHANLEY
STAFF COUNSEL
CATHOLIC CHARITIES OF THE DIOCESE OF BROOKLYN
ON BEHALF OF THE
NATIONAL CONFERENCE OF CATHOLIC CHARITIES

I am Mildred Shanley, Counsel and Program Officer with Catholic Charities of the Diocese of Brooklyn, New York. I am also the Chairman of the Legislative Committee of the National Conference of Catholic Charities. It is in this latter context that I testify on behalf of the approximately 1000 Catholic Charities diocesan and branch agencies and related institutions providing human services in virtually every county of the United States.

The issue before us and before this Subcommittee is the proposal by the President's Office of Management and Budget to drastically alter the vital historical role of voluntary, including religious, associations in our society in relationship to public policy and the role of the federal, state and local government. The Administration has invented a concept of "political advocacy", which has no constitutional or other legal basis, and under its definition would proscribe nearly all activity on behalf of the organized voluntary sector which during the history of our country has given our government its meaning and its role. If the proposed amendments to OMB Circular A-122 were now in effect, I could not even be here discussing this historical role with you. The change proposed is so drastic, so fundamental, so contrary to our laws, so unconstitutional, that if it is not withdrawn and is allowed to go into effect, we would have to resurrect Alexis de Tocqueville to undertake a new tour of this nation, whereupon he would have to sadly observe that the previous voluntary sector genius which gave this nation and its government its vitality has largely been stilled.

It is ironic that an Administration which prides itself on encouraging the strengthening of the private, voluntary and non-profit sector contains within it high officials with anti-democratic beliefs who would silence the voluntary sector from coming forth with a defense of the elderly, the sick, the homeless, the foster children, the refugees, indeed, the constitutional rights of the non-profit sector itself.

We hope that the proposal before us is simply the lack of thought, the lack of historical and constitutional insight, the product of simplistic reasoning, or the product of a random zealot or a rogue elephant in the Administration. If not, it represents the kind of thinking and the imposition of arbitrary will which can destroy our civil liberties. If, as we believe, it is unreasoned, unconstitutional and far exceeding either OMB's jurisdiction and the laws of Congress, we would expect the Administration to withdraw the proposed regulation.

While it is true that the National Conference of Catholic Charities does not presently have a federal grant - it recently did - Catholic Charities of Brooklyn has a number of such grants which would bring us under the regulations. So, too, for Catholic Charities throughout the country. The government relies on us and other church sponsored and secular non-profit agencies to deliver human services. If you preclude an agency such as Catholic Charities, which has advocacy for social justice among its stated purposes, from delivering services with government funds, you will wind up with an even larger government bureaucracy, and you will have a statist system of human services.

Independent Sector's President Brian O'Connell's major categories of criticism of the pending rule change seem to have defined the debate. The proposed rule is unnecessary. The proposed rule is unworkable. The proposed rule is unconstitutional as well as well beyond the laws of the United States.

UNNECESSARY

At the outset, let me state that Catholic Charities supports the proposition that federal funds should not be used to influence legislation unless in its wisdom the laws passed by Congress and signed by the President should permit some exceptions. In our own field, we note one exception in Title XX of the Social Security Act, the social service title, which has stated that social services are what the various states defined them to be. In this case, advocacy to secure entitlement benefits for the elderly and others was clearly a reimbursable expense and a permitted activity. There are others as well.

Catholic Charities operates strictly within the current restrictions of the Internal Revenue Code. We do not participate in elective politics, and we do not violate the substantiality provisions of the Code. At the same time we are prohibited by law, and by our choice, from exercising the 501(c)(h) option of the code which defines lobbying limitations in clear dollar terms. We would point out that the legislative history of this provision makes clear that it is meant in no manner to define "substantiality." Yet we feel that in practice we are likely to fall below the dollar marks in (c)(h). It is confusing if you would count a sermon in church on Sunday as grass roots lobbying rather than an act protected by the First Amendment.

In addition, we are careful to observe the strictures of other federal laws which prohibit the use of federal grant funds to influence legislation. We are unaware of a single abuse or violation by our member agencies of the provisions of the Code or other laws restricting advocacy. If there are abuses or violations, we would support action against them. We have, though, been unable to locate a copy of the purported GAO study of such abuses which is cited as a basis for the proposed rule change by the President's Office of Management and Budget. In addition, our national staff has been involved in discussions about the proposed rule with the Office of Management and Budget, and the OMB has not been able to cite any but a few purported abuses out of the several hundred non-profit organizations in our nation.

It does, therefore, seem clear to us that the proposed change in OMB Circular A-122 must be designed to do something else than curb non-existent abuse. We believe that its author or authors intend the change to have a totally chilling effect on the relationship between the voluntary, independent non-profit sector of our country and the development and administration of our government's social policy responsibilities.

UNWORKABLE

That brings us to our second area of concern and opposition to the OMB proposal. We believe both that its administration would place an undue burden on government and the non-profit sector, and that its chilling effect would begin to revamp the historic role of voluntarism in our country, that role of the voluntary sector which has, as de Tocqueville observed some time ago, provides such vitality and creativeness for our nation.

On the matter of administration or enforcement of the sweeping rule, I would observe that one of the major purposes of thousands of our voluntary associations - advocacy for any number of causes - would be denied, or thousands of these associations would die, and our society would suffer sorely for their death. On the other hand, in order to enforce the incredible breadth and depth of the order, the government would have to have squad after squad of investigators prowling the halls of tiny and large non-profit organizations, or terribly complex and frequent questionnaires too burdensome for all but the largest of the non-profit associations to complete.

Frankly, we believe that if the order is to be permitted to go into effect, we will all witness the most massive movement of civil disobedience this country has ever seen. It does not seem wise to us, or possible, to generate respect for law by enacting unwise and utterly unenforceable laws.

Let me cite just a few examples of what the regulation change might mean about the interaction between the Catholic Charities Movement and federal, state and local government.

Refugees to this country are not settled by the federal government, though the government, on behalf of all the people of the country, does pay some of the initial costs of resettlement. Refugees are resettled by the non-profit sector, and in good measure by the religious groups of the country. In the case of the post-Viet Nam refugees, over 50% were resettled with the help of Catholic Charities agencies. Are our experiences and ideas only to be available to the government upon written request of each party in the government, on the federal, state and local level? And in the later case of Haitian refugees, we again and again had to appeal to Members of Congress and to the Justice Department, the Immigration and Naturalization Service, and the White House itself, and we had to join in representation before the courts to see that the laws of our nation were adhered to by our own government. Was this improper activity? It would largely be prohibited by the pending rule.

Most children in foster care are under the jurisdiction, through the laws of the states or the action of the courts, of non-profit organizations such as Catholic Charities. We care for them and try to move them back into permanence with their families or, if that proves impossible, with loving adoptive parents. All of this service is partially reimbursed with state and federal funds, out of our nation's concern for the health and strength of children and their families. It became apparent some years back that the foster care system was sluggish, that thousands and thousands of children were being stuck there rather than being returned to or moved to permanence in a family. What happened? Non-profit groups appealed for changes in federal law to rectify this situation. And with the leadership of Congressman George Miller and then-Congressman John Rousselot of California, change was made. Was this inappropriate behavior on our part, as long as it was within the strictures of the Internal Revenue Code? The proposed OMB rule would effectively forbid this sort of action.

We could give hundreds of examples where interaction between those agencies delivering services and the government is essential to improve that service, and where the initiative must be taken by the service providers. I will give only one more. In the field of mental health, the government prematurely insisted on the deinstitutionalization of emotionally or mentally ill patients before there was a structure of halfway and other houses ready in the community, along with the supportive social service systems, to most enhance the ability of these citizens to cope. In community after community, agencies have had to initiate contacts with and combat zoning boards to enable the creation of small residential facilities in the neighborhoods of our cities and towns. Even this contact with local zoning boards would in many instances be prohibited by the OMB change in Circular A-122.

It almost seems that the proposed change is designed to get the government out of human concerns and human caring altogether. It is quite apparent that government could not function as a supporter in these areas if the experience of the private sector is not available to it.

UNCONSTITUTIONAL

We believe the proposed rule change exceeds the authority of the OMB, violates and extends far beyond existing federal law in the Internal Revenue Code, the various authorizations and appropriations bills, and is, in fact, a violation of the First Amendment rights of our Catholic Charities organizations. Others will spell out the arguments for these concerns in great detail. For our part, we can find no reasonable grounds for the executive branch of our government, or even, for that matter, the legislative branch, to curtail our right to speak and to petition our government.

The National Conference of Catholic Charities is a party to an amicus brief on the First Amendment issue in the Taxation case before the Supreme Court. You can imagine how distressing it is to us to realize that if the proposed OMB restrictions were in effect, we might very well not even be able to appear as a friend of the highest court of our land on a matter central to our constitutional rights, unless we, ourselves, were a party to the suit involved.

CONCLUSION

There is a bottom line. Our examination of the issues and problems surrounding the OMB Circular A-122 change on advocacy suggests clearly that it cannot be amended before final promulgation, that it cannot be modified or changed around the edges. The regulation and the concept behind it is fundamentally flawed. The bottom line, the only acceptable action on the part of the government, is withdrawal of the proposal.

We find it troubling that our government should have in our service people who are so insensitive to the fundamental concepts underlying our democracy. We find the philosophy underlying the OMB rule to be totalitarian in nature. And we feel its promulgation would be totalitarian in effect.

Mr. BROOKS. Thank you very much. I would like to ask you one question. How would this proposal affect the nonprofit organizations' ability to deliver services at the local level? Would it have any impact there?

Ms. SHANLEY. Yes; it would make us choose between delivering services, being able to speak out on current issues, or incur significantly increased costs to do both.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. I have no questions, thank you.

Mr. BROOKS. Thank you. Mr. Clinger?

Mr. CLINGER. Thank you very much, Ms. Shanley.

Mr. BROOKS. Our next witness is Robert Weymueller. Mr. Weymueller is director of government relations for the American Lung Association and formerly executive director of the Association's medical section.

He has worked in the tuberculosis field since graduation from Kent State in 1949. That is a long time. You don't smoke cigarettes, do you?

Mr. WEYMUELLER. No, sir.

Mr. BROOKS. You have never found any evidence that cigar smoking causes any health problems, have you?

Mr. WEYMUELLER. I would rather pass on that.

Mr. BROOKS. We are delighted to have you with us and if you will proceed with a summary, we would accept your prepared statement for the record.

STATEMENT OF ROBERT G. WEYMUELLER, DIRECTOR OF GOVERNMENT RELATIONS, AMERICAN LUNG ASSOCIATION

Mr. WEYMUELLER. Mr. Chairman, and members of the subcommittee, I am delighted to be here and I was particularly heartened by the thrust and tenor of your opening statements, Mr. Brooks, and Mr. Horton. I think that it is essential that we keep in mind that some damage has already been done out in the community just by the promulgation of the possibility of these amendments. Some of you may remember back to the early 1970's under a previous administration when the IRS suddenly got on the case of several voluntary health groups and it cast a chill on public advocacy that is still with many of our volunteers now. There was no negative finding and nothing done but just the possibility scared people away from public advocacy. I think we are into this mode again.

Mr. BROOKS. Will the gentleman yield for a moment?

Mr. WEYMUELLER. Yes, sir.

Mr. BROOKS. There were several groups who were very interested in this particular hearing who said that, maybe they had better not testify publicly but that they wanted to submit statements. They didn't want to testify though and that proves that the chilling effect of just the promulgation of this kind of an edict is disastrous.

Mr. WEYMUELLER. Exactly.

Mr. BROOKS. For public opinion, and a free expression under the Constitution.

Mr. WEYMUELLER. That's right.

The American Lung Association is America's oldest voluntary health association and we have had a lot of experience in this field.

We strongly oppose these proposals. We feel they are unnecessary and unreasonable, they should be pulled back, revoked and not just amended. And the sooner, the better.

From the founding of the American Lung Association some 80 years ago, our citizen volunteers have worked to improve the public health. Our basic approaches have been through education, demonstrations, and seed money for research. But we learned early on that one of the best ways for improving health was to improve public health policies so our entire history has included public advocacy, starting with tuberculosis control and now covering all lung diseases. We have an oversight method within our organization for tracking those issues. The staff doesn't just decide that suddenly we are going to take off and oppose or propose. We have a volunteer board of directors which determines which advocacy priorities are related to our health priorities. It is also our volunteers who are consulted regarding the appropriateness of occasional Government grants that we receive to supplement our programs and I underscore occasional.

Besides the oversight of our volunteers, public advocacy programs operate within the constraints of the governing of all tax-exempt 5013C organizations, which we are. We are registered under the 1976 legislative law and, as you know, that legislation explicitly recognizes the validity of nonelectoral lobbying by groups such as ours, subject to certain conditions. When it comes to avoiding the use of Federal grant funds to lobby, that principle has long been established in law and that has been brought out here. In health for instance, since 1979 the Health and Human Services appropriations bills have routinely carried a prohibition against the use of any of those funds for lobbying.

Ironically, the proposed restrictions come at the very time that the administration is trying to send a signal to the private sector that we should work more closely with Government, that we should be more supportive, take up some of the load previously done by Government. To add to the dilemma facing groups such as ours, the recent Executive order which has been alluded to here regarding the Combined Federal Campaign declared that any of the participant health and welfare groups carrying out public advocacy programs would no longer be eligible to participate in CFC. I would remind you that the funds from this campaign are not grants. They are contributions of Federal workers. Now, just to cite one example of the public's benefit from advocacy of groups like ours, I would tell you about the Lung Association, Heart Association, and the Cancer Society 2 years ago working together with Members of Congress to save the funding for the Office on Smoking and Health which Mr. Stockman and others felt should be cut severely. The future of that office was in jeopardy. This at a time when the Surgeon General was saying that smoking is the single most preventable cause of death in this country. And we were talking here about only \$2 million for OSH.

Now in fiscal 1984, I think it is ironic the President himself has recommended that that Office be increased in funding by 75 percent so apparently the administration now feels that the modest Federal program is worth not only saving but improving.

I would like to comment that most of the grants in my experience over the years have been grants that the Government felt the private sector could do better or would do better with and I think they were right. The problems for the American Lung Association would be substantial under these regulations—but it is the small group that would really be devastated—the small health agencies and I cite just one, the National Society for Autistic Children which has seven full-time members. Yet it is a conduit for a \$100,000 grant to help teach autistic children throughout the country how to cope. That society would be devastated by what is being proposed.

In the final analysis, the OMB proposals are essentially a matter of bureaucratic overkill on what is perceived as a major problem but is not. Thank you.

[Mr. Weymueller's prepared statement follows:]

Testimony Presented By
Robert G. Weymueller
On behalf of
American Lung Association

I am Robert Weymueller, Director of Government Relations for the American Lung Association, which is this country's oldest voluntary health association. I very much appreciate the opportunity to express publicly the strong opposition of the ALA to the proposed amendments by the Office of Management and Budget to its "Cost Principles for Nonprofit Organizations" (OMB Circular A-122). The amendments which would greatly restrict and hamper the public advocacy of voluntary organizations that receive federal funds are unnecessary and unreasonable. They should be withdrawn not modified as OMB now says it will do in view of the firestorm of reaction from the private sector. They have doubtless already had a chilling effect on future advocacy plans of groups of all types because of the clouds of uncertainty that have been created.

From the founding of the American Lung Association some 80 years ago, our citizen volunteers have worked to improve the public's health. Our basic approaches have been through education, demonstrations and seed money for research. We soon learned, however, that one of the fundamental ways to improve health is to improve public health policies at all levels. Our supporters expect this of us. Determining which advocacy issues relate to our health priorities is the responsibility of our volunteer board of directors. It is also our volunteers who are consulted regarding the appropriateness of occasional governmental grants to supplement our programs.

Besides the oversight of our volunteers, the ALA public advocacy program is carried out within the constraints governing all tax-exempt organizations. In recent years, the Lung Association has come under the 1976 tax legislation passed by Congress. As you well know, that legislation explicitly recognized the validity of non-electoral lobbying by 501(c)3 nonprofit groups such as ALA, subject to certain conditions. When it comes to avoiding use of federal grant funds to lobby, that principle has long been established in law. One example relevant to grants to health organizations is the prohibition Congress has added to Health and Human Services appropriations bills in recent years barring use of any of these funds to lobby issues before Congress.

Ironically, the proposed OMB restrictions send a negative signal to the private sector at just the time the Administration is asking the sector to pick up more of what the government has done in the past. To add to the dilemma facing charitable organizations, the recent Executive Order regarding the Combined Federal Campaign declared that any of the participant Health and Welfare groups carrying out public advocacy programs would no longer be eligible to participate in the CFC. In this instance, the funds in question are voluntary contributions from federal workers, not government grants.

To cite just one example of the public's benefit from our advocacy, it was the Lung Association, Heart Association and Cancer Society at a key time two years ago that convinced Congress to restore funds for the Office of Smoking and Health after OMB had recommended severe cuts and its future was uncertain. Now, in FY 84, the OSH has been recommended for a 75% increase by the President. This is a remarkable turn around for the modest federal program dealing with smoke prevention education at a time the Surgeon General describes cigarette smoking as the chief cause of preventable deaths in this country.

By proposing changes that would force voluntary health organizations to choose between federal funds or their traditional public advocacy role, the OMB is creating an unusual problem for the government itself. It has been my observation that a substantial proportion of the health grants or contracts to groups such as ALA have been for the purpose of carrying out standard-setting or educational programs that the government believed, and rightly so, would be better accepted coming from the community. For example, when I was the Executive Director of ALA's Medical Section, the American Thoracic Society, we were encouraged to take leadership in establishing minimum epidemiological lung research standards via an NIH contract. Other mutually beneficial projects that have been carried out include model chronic lung disease education programs to be conducted by black lung clinics, respiratory medical device standards, tuberculosis therapy follow-up studies, among others.

These proposed new restrictions would impact upon larger organizations such as ALA, but they would make for an impossible situation for the small nonprofit health groups. Those agencies such as the National Society for Autistic Children which has only seven full-time staff members provide services of critical importance to the public plus an invaluable insight in the development of health care policies. That Society is currently the recipient of a special education grant of \$100,000 that permits working through universities to train teachers on the best ways to teach autistic children. Please bear in mind that without such instruction, 95% of the autistic adults end up in institutions and have health care costs two to three times individuals trained to cope. Why should the Autistic Society's overall operations be made needlessly complex or its public policy voice muted? What would the government achieve and at what cost?

In the final analysis, the OMB proposals are essentially a matter of bureaucratic overkill on what is perceived as a major problem but is not. The restrictions would go far beyond those limitations currently imposed by Congress, program statutes or the tax laws and would apply to many non-federally funded activities of organizations like ALA. However it is worded or reworded, a further OMB limitation on public advocacy would confront established and venerated charitable agencies with a choice between two undesirable results: forfeit urgently needed funds or cease to exercise our traditional rights as citizens to communicate and participate in the lawmaking process.

Mr. BROOKS. Thank you very much and I would like to ask you just one question. Do you foresee a danger that this OMB proposal could give governmental agencies the power to pick and choose the views that they hear on pending governmental decisions by soliciting opinions only from friendly organizations?

Mr. WEYMUELLER. Very much so, sir.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Mr. Chairman, thank you. Mr. Weymueller, I think you have an excellent statement. It is characteristic of all the other statements—I have been trying to read through them up here this morning, and I have been through a number of them. But it is typical of what is being said by organizations, conscientious organizations, that have tried to do their job, especially in the volunteer field.

As you heard earlier—I am concerned about the allocation of lobbying costs of particularly some of these big contracts like the one that was referred to earlier in the Department of Defense. What went on there is wrong. I think that there ought to be somebody stepping on people's toes when they do that, and holding their feet to the fire, and exacting out of them one way or the other, either through the Inspector General process, or through litigation, to make certain that they don't do that type of thing.

But I think yours is a very typical statement of what I am sure we are going to be hearing this morning and this afternoon from the nonprofit volunteer organizations that are trying to do a job in this country that makes the difference in our ability to accomplish things in the fields that are not provided for by government or by business and so forth.

Unfortunately, the people from OMB aren't here. I have a whole stack of this testimony, and I am going to ask my staff to send a letter which I will sign to Mr. Wright at OMB, enclosing copies of all this testimony, and particularly yours. I will ask that that person who is going to be working on that revision in the next 2 weeks to take a moment to read through some of these so that the people at OMB can be impressed that this is not just a group of unconscientious people complaining, but that these are sincere people who are very, very much concerned about the implications of what this proposed circular revision can do. I was impressed that the others who have testified, in particular the Comptroller General, stated that there really isn't that much need for this, that there is not that big a problem of using Federal funds for lobbying purposes. I am going to ask that they take a hard look at this type of testimony.

Thank you very much, it is excellent testimony.

Mr. BROOKS. I want to thank you very much for your testimony and for coming down here and being with us.

Mr. WEYMUELLER. Thank you, sir.

Mr. BROOKS. We have Florence R. Rubin of Newton, Mass., as our next witness. She represents the League of Women Voters of the United States where she is serving her fourth term as a member of the National Board of Directors. She is a political consultant with wide experience in State and local government, a former chair of the Massachusetts Judicial Conduct Commission, and was a leader in the successful campaign to reorganize the Mas-

sachusetts courts. She now serves on the Board of Directors of the Massachusetts Council for Public Justice.

We welcome you here today. You may summarize your remarks and put your whole statement in the record, if you would like. We are very pleased to have you here.

STATEMENT OF FLORENCE RUBIN, DIRECTOR, LEAGUE OF WOMEN VOTERS

Ms. RUBIN. Thank you, Mr. Chairman. I would like to request that the complete statement be incorporated in the record.

Mr. BROOKS. Without objection.

Ms. RUBIN. Mr. Chairman, and members of the subcommittee, the League of Women Voters of the United States is a nonpartisan citizen organization with members in all 50 States as well as in the District of Columbia, Puerto Rico, and the Virgin Islands. The league is concerned about the disastrous effect of OMB's proposal. We are concerned about the effect this would have on the participation of nonprofit organizations in the political process. We believe that OMB is having difficulty in formulating the changes that it is proposing because those changes are basically unsound, unnecessary and possibly unconstitutional. They strike at the heart of two basic concepts of government; the right of the public including nonprofit organizations to have full access to the governmental process and the need of Government officials for information on which to base public policy decisions.

Further, we believe that the language proposed by OMB in dealing with political advocacy is overly broad, goes beyond congressional intent, threatens protected first amendment rights, and is generally unwise.

I can't help but comment that the effort by OMB appears to be out of line with the announced policy of the administration to decrease the regulatory activities of Government. OMB's action would extend the regulatory power of that agency to a new and unprecedented area. I might also endorse the comments that were made by previous speakers about the inconsistency of such a proposal in light of the administration's desire to form an effective compact between Government and the private sector in the delivery of services.

Our basic concerns can be characterized as follows:

One, we believe that OMB lacks the statutory authority to promulgate a directive of this nature. We know of no law that Congress has passed of general applicability authorizing such a broad regulatory reach into the realm of political expression; and two, OMB has failed to bring forth convincing evidence of any need for this amendment to Circular A-122. All of us heard the Comptroller say this morning that there were no major abuses. The change would represent a radical departure from accepted practices and there does not seem to be a convincing need for such a change.

Three, we are deeply concerned about the impact of the proposed change on the exercise of rights protected by the first amendment and on the political process. We are particularly concerned about OMB's expanded definition of political advocacy. To OMB political advocacy would include contact with all levels of government and

efforts to influence public opinion as well. The very activities OMB wishes to restrict, I understand, have been recognized by the Supreme Court as forms of political expression entitled to the full protection of the first amendment.

In OMB's expanded definition of political action, we would have concerns about litigation that some nonprofit organizations are involved with now when they file amicus briefs and we are also concerned about the broad reach of OMB's proposal in including as political advocacy attempting to influence governmental decisions through communications with Government officials and employees.

This seems to be so open ended a definition of governmental decisions that it would encompass virtually every kind of action possible by a governmental body. It is conceivable that this aspect of political advocacy could be construed to include most of the things that a nonprofit organization might do in its relationship with any branch or level of government. It is also apparent that because of its vagueness, the proposal, if implemented, would require a greatly augmented OMB staff to enforce and interpret it.

I was interested this morning in the questions that were posed to OMB about whether they had considered the fiscal impact of these proposed changes, and clearly they had not considered that impact on the nonprofit organizations nor, I dare say, on OMB itself since it would have a great deal of difficulty, I would imagine, in enforcing the provisions that were so vague and allowed so much discretion.

There are a number of things that we feel are unclear in these proposed changes. For example, would OMB consider a publication produced for wide citizen use that contained a pro and con discussion of a contemporary political issue to be an attempt to affect the opinions of the general public or any segment thereof in order to influence a governmental decision?

And how would OMB treat a conference involving an array of speakers with a variety of views on a public policy issue? We are really deeply concerned that the net effect of this broad brush approach, and the vagueness that permeates the descriptions of political advocacy, would force nonprofits to be really afraid to do any of the normal activities that might be considered political advocacy.

And we are also concerned about the unjustifiable burdens it imposes by requiring separate staff, separate offices, separate equipment. While the League of Women Voters of the United States is not a Federal grantee or contractor, we do share office space facilities and equipment with what OMB might consider an affiliated organization, the League of Women Voters Education Fund. The Education Fund is a charitable trust with 501(c)(3) status and it has in the past provided services to the Government through Federal grants and contracts. Since the LWVUS is a political advocacy organization, these changes might affect the relationship between the LWVUS and the LWVEF and force separate office space, and that would be a financial hardship for both organizations.

To make matters worse, the OMB proposal does not really clearly identify what it means by affiliated organizations. It is quite clear that if these changes were to go into effect, only the organizations that were large and well financed would be able to fulfill

their role in the contracts as well as exercise their first amendment rights.

We are also concerned about the impact on the public if this proposal is implemented and its chilling effect on nonprofit organizations, preventing them from performing the wide range of functions and activities that play such an important role in the democratic process.

There was a case in West Virginia that the league was involved in as an amicus curiae and I just wish to quote a small part of the decision:

To prohibit robust debate on the questions [of that suit which were environmental issues] would deprive society of the benefit of its collective thinking and in the process destroy the free exchange of ideas which is the adhesive of our democracy.

Mr. Chairman, in concluding, I really do wish to thank you for holding hearings on this important subject by bringing the attention of Members of Congress to the problems created by OMB's proposed change in Circular A-122. We hope that the change will not only be sent for further review as OMB indicated this morning, but that it will be removed altogether. We really do not want a revised version of this proposal; we would hope that it would be stopped altogether so that we can prevent OMB from really demolishing the legitimate and important role played by hundreds of nonprofit organizations in the governmental decisionmaking process. Thank you, Mr. Chairman.

[Ms. Rubin's prepared statement follows:]

TESTIMONY BEFORE THE
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

by

FLORENCE RUBIN, DIRECTOR

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

Mr. Chairman, members of the Subcommittee, I am Florence Rubin, a member of the Board of Directors of the League of Women Voters of the United States. I am here to express the League's concern about the changes that OMB proposes to make in Circular A-122, "Cost Principles for Non-Profit Organizations," that would establish special provisions for costs related to "political advocacy."

The League of Women Voters of the United States is a nonpartisan citizen organization with members in all 50 states as well as the District of Columbia, Puerto Rico and the Virgin Islands. Ours is an organization whose very existence is based on citizen participation in government.

In all its efforts, the League of Women Voters' stock in trade is citizen access to governmental processes and governmental decision making. Believing that an informed citizenry is an essential part of a democratic system, the League seeks to inform citizens about how government works and to motivate them to become involved and informed participants in the democratic process. Therefore, we express our concerns to you today about OMB's proposed changes that we believe would adversely affect the democratic processes whose functioning we believe is necessary for government to operate properly.

We are frankly appalled at the attempt by OMB to effect changes in Circular A-122 that would have an adverse impact on the political process. The changes proposed are ill-advised, unsound and possibly unconstitutional. We believe that they strike at the heart of two basic concepts of government: (1) the right of the public (including nonprofit organizations) to have full access to the governmental process; and (2) the need of government officials for information on which to make sound and informed decisions. The proposed changes would disallow certain costs related to federal grants and contracts, and seek to impose a wall of separation between government grant activity and organizational activity that may include what OMB defines as "political advocacy." We believe that the language proposed by OMB is overly broad, goes beyond congressional intent, threatens protected First Amendment activities and is generally unwise.

Further, this effort by OMB appears to be out of line with the announced policy of the Administration to decrease the regulatory activities of government. OMB's action would extend the regulatory power of that agency to a new and unprecedented area.

We maintain that the OMB language poses a serious threat to legitimate activities that the League has sought to encourage since its inception in 1920: the ability of citizens and organizations to communicate with and participate in all aspects of government. We believe that the ability to influence government decision making is an essential and appropriate aspect of the democratic process. Since the proposed OMB directive is targeted to nonprofit organizations, we assume the greatest effect would be on public charities tax exempt under 501(c)(3) of the Internal Revenue Code, and on smaller nonprofits. A very heavy impact would be borne by these organizations because they would be restricted from participating in the democratic process or they would have to forego seeking government grants and contracts. Specifically, we think a 501(c)(3) affiliated with another organization, or a small nonprofit could not afford to establish physically separate facilities and staff for activities OMB might possibly construe as political advocacy.

Our basic concerns can be characterized as follows:

1. We believe that OMB lacks the statutory authority to promulgate a directive of this nature. We know of no law that Congress has passed of general applicability authorizing such a broad regulatory reach into the realm of political expression. While OMB cites no particular legislative authority for its proposal, it seems clear that OMB's proposed restrictions also go well beyond any that Congress has imposed on particular federal funding programs. Further, OMB's own explanation accompanying the proposal confirms its intent to go beyond the restrictions on influencing legislation that Congress has imposed on all public charities under Section 501(c)(3) of the Internal Revenue Code.
2. OMB has failed to bring forth evidence of any need for this amendment to Circular A-122. The change would represent a radical departure from accepted accounting practice, and indeed the general principles of Circular A-122 itself. The OMB proposal would operate in a manner totally at odds with the purpose of Circular A-122 as articulated by OMB itself, and that is to "provide that the federal government bear its fair share of costs except where restricted or prohibited by law." There is no question that the government has a duty to prevent the use of federal funds for purposes not related to a specific grant or contract, or for improper purposes as defined by specific statutory limitations. That governmental need can be met by existing cost accounting practices under Circular A-122. When an agency proposes a rule that represents a radical change from existing rules, without specific statutory authority and with no demonstrated need for the change, it seems very clear that the agency is acting arbitrarily, capriciously, and unlawfully. Such is the case with this proposal.
3. We are deeply concerned about the implications of the proposed change for the exercise of rights protected by the First Amendment and for

the political process. Congress has shown a careful respect for the expression of political views, and for the ability of citizens and organizations to be informed about and to comment on the government decision making process. It would be a travesty for OMB to ride roughshod over those rights that Congress and the Courts have been careful to protect. As an example of OMB's peculiar reasoning, we point to its expanded definition of "political advocacy." To OMB political advocacy would include contact with all levels of government, and efforts to influence public opinion as well. The Supreme Court has recognized the very activities OMB wishes to restrict as forms of political expression, entitled to the full protection of the First Amendment.

Let me elaborate on our concerns about OMB's definition of political advocacy.

As I have noted, many of the nonprofit organizations that perform services under government grants and contracts have tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. Statutory restrictions limit the amount of effort or resources that these organizations can devote to influencing legislation, and prohibit these organizations from engaging in any election-related partisan political activities.

OMB has stated explicitly in the Federal Register that language relating to political advocacy is intended to go beyond restrictions imposed by Congress. OMB -- with its definition of "political advocacy" -- has attempted to create by fiat restrictions on forms of political expression undeniably entitled to First Amendment protection.

A prime example is Section 1.b.(5), which defines one aspect of political advocacy as:

participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf.

The Supreme Court recognized in NAACP v. Button, 371 U.S. 415 (1963), the decision OMB misconstrued, that access to courts -- in that case for the purpose of protecting civil rights -- is a form of political expression entitled to Constitutional protection. Apparently, nonprofit organizations that file amicus briefs, represent others in civil rights or public interest litigation, or provide financial support for such litigation -- all permissible activities for 501(c)(3) organizations -- would still be deemed by OMB to be engaging in "political advocacy." It would seem that nonprofit organizations could perform services under federal grants and contracts only by foregoing a legally recognized right to use the court system.

The broad reach of OMB's proposal is also apparent in Section 1.b.(4), which includes as political advocacy "attempting to influence governmental decisions through communications with government officials and employees." The separate definition of "governmental decisions" appears so open-ended as to encompass virtually every kind of action possible by a governmental body.

Another flaw in OMB's proposal is evident in this section: the vagueness of the language makes it impossible to determine the proposal's limits. Nowhere in the proposal is there a definition of "influencing," "communications," or "attempting." The vagueness of this section would leave all potentially covered organizations to wonder, without any guidance, whether they were engaging in political advocacy if they:

--submitted written comments on proposed regulations (⁴²~~17~~⁴³~~18~~ this amendment to Circular A-122);

- sent staff to meet with federal officials to discuss whether an agency was developing any regulatory changes, even if the meeting was used to collect information needed to carry out a federally-funded project;
- sent government officials the results of a study or research project bearing on a currently "hot" topic in public policy (assuming the results had not been requested in writing, the next question would be whether, in order to qualify as an exception to political advocacy under Section 1.c.(1), the distribution was "not primarily designated to influence...any governmental decision").

It is conceivable that this aspect of "political advocacy" could be construed by OMB to include virtually every kind of contact a nonprofit organization might have with any branch or level of government in the course of carrying out any of its ongoing activities.

Not only that -- it is apparent that because of its vagueness, the proposal, if implemented, would require a greatly augmented OMB staff to enforce it and interpret it. Further, it would place in OMB's hands a great deal of discretion that would enable OMB to enforce the provisions heavily in one area or against one group and differently in another situation.

Look also at the enormous potential hidden behind the vague language of Section 1.b.(3), which defines as political advocacy, "attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof."

For example, would OMB consider a publication produced for wide citizen use that contained a pro and con discussion of a contemporary political issue to be "an attempt to affect the opinions of the general public or any segment thereof" in order to influence a governmental decision? Is promoting public understanding and discussion of an issue an attempt to affect the opinions of the general public in order to influence government decisions?

How would OMB treat a conference, involving an array of speakers with a variety of views on an important public policy issue? Are a nonprofit organization's fundraising solicitations -- such as a direct mail appeal describing the work of the organization -- within the definition of political advocacy? They are undeniably addressed to the general public, and, if they are effective, they affect the opinions of those who receive them.

As a final illustration of this problem of vagueness, I turn to Section 1.b.(6), under which contributions of any kind to another organization that engages in "political advocacy" are themselves a form of "political advocacy." How much political advocacy the recipient organization must engage in to trigger this section is not possible to discern from the proposal's language. Again, how would OMB define a contribution? Would OMB go so far as to include subscriptions to the magazines of those organizations that treat purchasing a subscription as a means of becoming a member?

We are deeply concerned that the net effect of this broad brush approach -- and the vagueness that permeates the descriptions of "political advocacy" -- would be to leave nonprofit organizations afraid that any of their normal activities could be considered by OMB to constitute "political advocacy."

Certainly there is nothing in the proposal itself to prevent that result.

While this proposal is objectionable because of its impermissible intrusion into public access to government decision making, the unjustifiable burdens it imposes compound its negative effects.

OMB proposes not only to deny federal reimbursement for costs of those activities deemed to be "political advocacy" that are carried out as part of a federal project; it also proposes to deny federal reimbursement for otherwise allowable costs if an organization engages in "political advocacy" that is financed with nonfederal funds.

For example, no salary costs for an individual would be allowable if that individual, during hours other than those devoted to a federal grant or contract, did any work OMB views as political advocacy. Similarly, no costs could be charged to federal projects for equipment or items (whatever that means) that, in addition to being used for the federal project, were used -- even once -- for an activity OMB determined to fall within the realm of political advocacy.

The provision about allowable space costs also imposes unacceptable burdens on organizations. The OMB proposal states that an unallowable cost would be "building or office space in which more than 5% of the usable space occupied by the organization or an affiliated organization is devoted to activities constituting political advocacy." [Section 1.f.(2)(a)] We offer our own situation as an example. While the League of Women Voters of the United States is not a federal grantee or contractor, we share office space, facilities and equipment with what OMB might consider an affiliated organization, the League of Women Voters Education Fund. The Education Fund, which is a charitable trust with 501(c)(3) status, has in the past provided services to the government through federal grants and contracts. Since the LWVUS is a political advocacy organization, the imposition of the proposed OMB changes might force the physical separation of the LWVUS and the LWVEF. We submit to you that such a separation would be a financial hardship on both organizations. As the arrangement stands now, the expense of space is allocated proportionally between the two organizations.

Further, nowhere in the OMB proposal is the term "affiliated organization" defined. The failure to provide such a definition leaves unanswered a very basic question -- how distant a connection to another organization's "political advocacy" would satisfy OMB that the nonprofit contractor is not tainted?

When one looks at the potential financial penalties -- the disallowance of federal reimbursement of any grantee staff costs, equipment or materials costs, or space costs, for organizations engaging in "political advocacy," one concludes that these penalties are very harsh indeed, out of proportion to the purported evil that OMB wishes to stamp out. Practically speaking, in order to be sure not to run afoul of the penalties OMB proposes, most nonprofits would be forced to set up a separate structure -- separate location, separate facilities, and separate staff and management structure to provide services under federal grants and contracts.

The reality is that for many nonprofit organizations, particularly those that are small and without large financial reserves, the expense involved in creating and maintaining such a separate entity would be prohibitive. For those organizations the choice would become whether or not to undertake federal projects. And, that choice would also mean the choice of whether to refrain from any activities that might be deemed "political advocacy." Only those organizations with substantial financial resources will be able both to undertake federal projects and to continue to exercise their First Amendment rights. Certainly that result is not acceptable.

There are other potential effects of this proposal as well. The broadness of the OMB language leads us to think that OMB could construe as unallowable activities for 501(c)(3)s that are also federal grantees any of their usual, ongoing functions: citizen education, litigation, submitted comments to agencies, and contacts with other organizations. Such nonprofit organizations would therefore be forced into the choice that you, Mr. Chairman, noted in your press release between performing government-funded civic and public services or participating in the political process. Furthermore, we are concerned that if OMB gets a stamp of approval for this Pandora's box definition of "political advocacy," there may spring forward a whole second generation of restrictions on tax-exempt organizations, even for those that are not in a position to provide services to the federal government under grants or contracts.

Finally, we must address the impact on the public if this proposal is implemented and its chilling effect discourages nonprofit organizations from performing the wide range of functions and activities that play such an important role in the democratic process. An eminent statement of the importance of this public process was made recently in a state court opinion interpreting the First Amendment.

The case arose in West Virginia; the League was involved as an amicus curiae. In granting a writ to prohibit a libel suit by a coal company against environmentalists who were reporting water pollution to federal agencies, Justice McGraw of the Virginia Supreme Court of Appeals spoke most eloquently about the very rights at stake in the proposal we consider today:

we shudder to think of the chill our ruling would have on the exercise of First Amendment rights were we to allow this lawsuit to proceed. The cost to society in terms [of the] threat to our liberty and freedom is beyond calculation. This cost would be especially high were we to prohibit the free exchange of ideas on such pressing social matters as surface mining. Surface mining, and energy development generally, are matters of great public concern. Competing social and economic interests are at stake. To prohibit robust debate on these questions would deprive society of the benefit of its collective thinking and, in the process, destroy the free exchange of ideas which is the adhesive of our democracy. [Webb v. Fury, West Virginia Supreme Court of Appeals (1981), Slip Opinion, p. 32]

Conclusion

Mr. Chairman, in concluding my remarks, I want to thank you for holding hearings on this important subject. By bringing the attention of members of Congress to this problem, this committee can be a critical force in seeing to it that these unwise changes do not go into effect.

I wish to close by returning to some of the broader considerations that must be discussed. The proposed changes seem highly misguided and even dangerous. We think they are bad policy. Essentially, we believe the changes, if instituted, would not only restrict legitimate rights of nonprofit groups, we also believe the government itself would suffer. We are convinced that necessary information would be shut off from government officials about the very programs they implement and oversee. Organizations most knowledgeable about particular problems would be constrained from commenting to governmental officials, if the organization had a federal grant. Further, the public will suffer if the wide-ranging, robust public debate on issues that the First Amendment assumes and protects is diminished. Organizations that held federal grants would be unable to run litigation programs without endangering their grants, would be unable to participate in government decision making, could not seek to influence public opinion. All these activities are legitimate and necessary for the democratic process to work.

Further, the proposed changes would cost the government money. Leaving aside the costs of monitoring compliance with the amended circular, the government grants would in the future have to fund wholly separate staffs for a project, for example. Entire Xerox machines would have to be leased for projects, also facilities and equipment, to abide by OMB's concern over shared equipment and shared facilities. One could go on with examples. The point is that such excessive restrictions are foolish, and would be costly.

In this current effort, OMB appears to have set itself up as an institution not bound by constitutional guarantees and seeking to exercise powers far beyond its purpose. OMB's changes would impinge heavily on the activities of nonprofit organizations -- a vital nongovernmental sector of American life.

As an organization committed to an informed citizenry that participates in the political process, the League of Women Voters opposes the OMB changes that would unconstitutionally and unwisely burden that process with artificial walls of separation for political expression. At a time when the Administration is calling for increased volunteer activity and a strengthened public-private partnership, the changes OMB proposes would truly restrict the ability of nonprofit organizations to engage in such a cooperative effort.

We urge that Congress do all in its power to have OMB withdraw and abandon the proposed changes to Circular A-122, which potentially affect hundreds of nonprofit organizations that have a rightful role to play in governmental decision making processes. In addition, we would support legislation to prohibit OMB from effecting these proposed changes.

Thank you for the opportunity to make this statement.

Mr. BROOKS. Thank you. I now have one question.

Would your organization be able to continue in operation with its present structure under this OMB proposal?

Ms. RUBIN. Our organization with its affiliation with the League of Women Voters Education Fund would have great difficulty in continuing with this present structure because of the tremendous burden of additional expense that would be required to maintain the two organizations.

Mr. BROOKS. I want to thank you very much. I appreciate your coming down and being with us today, and making a significant contribution to these hearings.

Ms. RUBIN. Thank you.

Mr. BROOKS. Thank you very much.

Our next witness is Maudine R. Cooper, vice president of the National Urban League, where she has worked since 1973. She holds a B.A. degree, a law degree from Howard University, and has received several awards for her achievements and outstanding contributions to the community.

Ms. Cooper, we would accept your full statement for the record if you would summarize your statement. We are delighted to have you here and you can proceed.

STATEMENT OF MAUDINE R. COOPER, VICE PRESIDENT, NATIONAL URBAN LEAGUE

Ms. COOPER. Thank you, Mr. Chairman.

I would like to echo my support for those who have preceded me but to also add some additional comments on behalf of the National Urban League.

First of all, again, as my predecessors have indicated, we want to thank you for bringing this matter to the attention of not only the Congressmen who will know of these hearings, but also of the press and the media whom we have also been in close contact with, trying to get our story out to the public.

Our concerns in reference to this OMB Circular A-122 are many and diverse and of course again, have been echoed in large part by some of my predecessors. As a civil rights advocate, however, we are concerned about the first amendment and indeed the equal protection implications of the rule. As service delivery agents we are worried about the inevitable damage to our ability to continue to provide for the needs of our constituents. As a grant recipient subject to the constraints of section 501(c)(3) of the Internal Revenue Code, we are puzzled by what has prompted this drastic and fundamental change in how we operate. And as a nonprofit organization, we are baffled at the seeming contradiction between the administration's professed desire to encourage the voluntary sector and this effort to thwart any capability we might have had to respond to that charge. And, certainly we share the generic concerns of all those that will be affected by this ruling, both directly and indirectly, such as the legal authority for the amendment, the inevitable increase in paperwork, and the sure loss of our cost effectiveness.

We are indeed encouraged that OMB recognizes the gravity of the proposed amendments to Circular A-122 and has chosen to extend the comment period and to identify certain problem areas.

However, that does not provide solace to us and to many other national organizations. For example, and much of this information comes from the press release that was just issued last week: OMB still maintains that the present amendments will provide "uniform enforceable rules." We would suggest to you that such enforceability will require far more resources than are presently available as each Government contracting officer attempts to examine percentage utilization of equipment and monitoring of activities of other staff members who were paid part time by Government contracts. Further OMB initially failed to inform us of the basis of their concerns. Now, however, they indicate in the news release that there has been "significant instances of improper diversion of Federal funds for political advocacy." And of course much of that has been refuted by this morning's testimony.

Personally, I have not read that study that was discussed but I would suggest to you that on the basis of at least the Independent Sector's reading of that study that OMB is clearly on the wrong track and they ought to once again go back to, as you have said, to the drawing board on this circular. Certainly the present amendments do not pretend to address interpretations that OMB has thus far given you nor should it, since the United States Code provides clear penalties where misuse, misappropriation, misallocation, commingling, et cetera, of Federal funds are concerned. To further look at that quoted—I should say misquoted Comptroller's study—the call for guidance in relation to the uniform cost principles does not necessarily mean that an overly broad definition of "political advocacy" is the appropriate route. Again that was underscored by the Comptroller. The apparent key to OMB's concerns as publicly articulated is the subsidization of lobbying by the Federal Government. While we do not accept the notion that the amounts and levels of subsidization is sufficient to warrant this meat-ax approach to cost allocations, let's for a moment just look at the substance of that notion and let us further assume that such subsidization does in fact take place. Is it OMB's position therefore, that subsidization by the Federal Government per se is wrong? Is it OMB's position that subsidization of lobbying and any subsequent support of ideologies to which some segments of the American public object is wrong?

On this latter point, I might add that there would be few Federal dollars spent on anything if there had to be a national vote on every program area which the Federal Government now views as a national priority. We would probably have limited military expenditure and aid to foreign governments. Chrysler Corp. would probably be a memory, and product price supports would be a past practice.

Additionally, the release does indicate that contracts now in force would not be affected. However, if final publication of the regulations is proposed for the summer, it seems unfair again and overly burdensome for nonprofit groups to become prepared to address these new requirements by October 1 for new contracting activity.

Finally, the release does suggest to us that OMB is really preparing to provide substantial employment to a large number of unem-

ployed lawyers and a tremendous increase in the caseloads for the presently overworked judicial system.

Volumes will emanate from judicial declarations of what constitutes "standard marketing activities" or "substantial equipment usage;" and whether an alleged violation was inadvertent or technical. But beyond the present proposed changes, there are still a number of unanswered questions. For example, when does a Federal contract dollar cease to carry that characteristic and become some other kind of dollar excluded from the requirements of the circular? Why the unequal treatment between Federal dollars flowing between nonprofits and the Federal Government and dollars flowing to State and local governments from the Federal Government, and more importantly, their subcontractors and/or subgrantees? What this seems to suggest to us is that the primary target of these regulations are indeed national organizations.

The National Urban League, therefore, strongly urges this Congress, and indeed this committee, to recommend to this Congress to use all of the resources at its disposal to effectuate the withdrawal of these guidelines. Thank you.

[Ms. Cooper's prepared statement follows:]

Testimony of
 MAUDINE R. COOPER
 Vice President for Washington Operations

NATIONAL URBAN LEAGUE, INC.

Before the
 House Committee on Government Operations
 Subcommittee on Legislation and National Security

on

OMB PROPOSED CIRCULAR A-122

Room 2154
 Rayburn House Office Building

Tuesday, March 1, 1983

Good morning. I am Maudine R. Cooper, Vice President for Washington Operations of the National Urban League. My office serves as the principal representative and voice in Washington for our network of 118 affiliates in 36 states and the District of Columbia. These local offices provide services to the poor and minority community as the primary means to achieve the Urban League's mandate to secure equal opportunities for the disadvantaged in all sectors of our society. We have also pursued this goal, since 1910, by seeking to bring about changes in government and social systems which produce disparities among groups of Americans.

I am particularly appreciative of this opportunity to appear before the Subcommittee today because our concerns about the Office of Management and Budget's (OMB) proposed revision to Circular A-122, "Cost Principles for Nonprofit Organizations," are many and diverse. As civil rights advocates, we are concerned about the First Amendment

and equal protection implications of the rule. As service delivery agents, we are worried about the inevitable damage to our ability to continue to provide for the needs of the disadvantaged. As a grant recipient subject to the constraints of Section 501(c)(3) of the Internal Revenue Code, we are puzzled by what has prompted this drastic and fundamental change in how we operate. And as a nonprofit organization, we are baffled at the seeming contradiction between the Administration's professed desire to encourage the voluntary sector, and this effort to thwart any capability we might have had to respond to that charge. And certainly we share the generic concerns of all those that will be affected by this ruling, both directly and indirectly, such as the legal authority for the amendment, the inevitable increase in paperwork, and the sure loss of cost-effectiveness. While we have recently learned that OMB intends to rewrite the proposal, our concerns are in no way assuaged. The agency has not specifically outlined which provisions it will refashion, nor what form these modifications will take. Nothing less than a total withdrawal can possibly correct a proposal that was so ill-conceived at the start, and poses such serious constitutional threats in the future.

Before I proceed any further, let me state as emphatically as I can: The National Urban League does not now, nor have we ever supported the use of federal money for political advocacy. We have always understood and faithfully observed the political limitations of the Internal Revenue Service (IRS)--much like government workers are constrained by the Hatch Act and your own employees are prohibited

from simultaneously working on your campaigns." We have asked for no special treatment, simply a reasonable and workable framework that allows us to participate in the democratic process, foster the free flow of ideas, and assure that the voice of the politically impotent is heard.

Yet with the publication of the proposed revision of Circular A-122, we are faced with a double barrel attack on these basic freedoms and goals. On the one hand, a definition of "political advocacy" has been proffered that is so overbroad as to forbid even the most innocuous activities, and on the other, a cost allocation system would be imposed that is so cumbersome that only the largest and most sophisticated contractors would be able to comply with its provisions. In effect no longer would we be able to communicate with our affiliates about pending changes in civil rights laws, we would not be able to communicate with members of the Congress about our experiences with programs you have asked us to implement, and we would not be able to pool costs with the government for copying machines, telephones, or office space. Both the means and techniques that we employ to further the goal of equal opportunity would be banned.

This extraordinary action is ostensibly justified by OMB's contentions that there has been a "...diversion to political advocacy of federal funds...", "...an abuse of the system and an uneconomical, inefficient and inappropriate use of the public's resources," and that this has created "...the appearance of federal support for particular positions in public debate" and "...a distortion of the market place of ideas..." To suggest that these unproven and erroneous assumptions

are a sufficient and compelling rationale truly strains credulity. I am hard pressed to believe that if the Indianapolis Urban League, which has been involved in employment and training for concern about the proposed regulations governing the new Jobs Training Partnership Act, anyone would suggest that this represents the government's position or is considered lobbying. Rather their experience in the field undoubtedly improves the discussion and assures that diverse non-governmental input is considered. Again, the IRS does a credible job of ensuring the appropriate use of the public's money, granting the

of 501(c)(3) status only to those charitable organizations fulfilling obligations that the government has deemed necessary, but is unable to deliver itself. In our case, that obligation is the delivery of needed services and definitely not "diversion" to so-called advocacy. As required by law, we keep federal grant monies separate from the contributions received for general operations. Very simply, we see no evidence that there is any need for the type of changes suggested by OMB.

Present Law is Sufficient

The OMB notice states ... "the diversion to political advocacy of federal funds, and of equipment procured with and personnel compensated by federal funds, is an abuse of the system and an uneconomical, inefficient and inappropriate use of the public's resources." (48 FR 3346). That said, the notice proceeds to layout the proposed restrictions the obvious implication being that the currently proposed amendment is the only effective and efficient way to stem this diversion. However, OMB has supplied no evidence of the abuse upon which this proposal is allegedly based. It does not enlighten the affected class as to why current legislative provisions are insufficient in barring the use of federal funds for political

advocacy activities. Indeed the notice implies that there are currently no means by which to do this, and that is not the case.

Congress has passed specific legislation in instances where it wanted to restrict the very use of federal funds. Congressional appropriations for the Departments of Labor, Education, and Health and Human Services include language that prohibits the use of federal contract or grant funds "to pay the salary or expenses of any grant or contract recipient or agent acting for such recipient to engage in any activity designed to influence legislation or appropriations pending before Congress." (P.L. 97-92, Sec. 101(a)(2) incorporating by reference H.R. 4560, 97th Congress; see also P.L. 96-536, Sec. 101(a)(4) and P.L. 96-123, Sec. 101(g) incorporating by reference H.R. 4389, 96th Congress; and P.L. 95-480, Sec. 407)*

Congress has set other statutory limits, such as the one placed on the Legal Services Corporation. The Legal Services Corporation Act, 42 U.S.C. 2996 f (b)(1) and (b)(2), prohibits the use of grant and contract money received by the Legal Services Corporation from being used for unauthorized lobbying and political activities.

In addition, the Internal Revenue Service (IRS) reaches virtually all tax-exempt organizations that receive federal grants and contracts under Sec. 501(c)(3) of the Internal Revenue Code (IRC). Sec. 501(c)(3) prohibits tax exempt organizations from engaging in "substantial" lobbying activities; or permits them to elect to be subject to specific expenditure limits for such activities. Failure to comply with these pro-

*Congressional Research Service, Library of Congress, "Analysis of Potential Legal Issues," February 18, 1982.

visions ultimately results in the loss of tax exempt status.

Congress has made it quite clear under what circumstances it wishes to restrict the use of federal funds. It has enacted no sweeping restrictions such as the one proposed by OMB.

OMB Authority

Given the traditional oversight role that the IRS has played coupled with the constitutional separation of duties between the executive and legislative branches of government, there is certainly a question as to whether the OMB has the authority to issue such a revision. Certainly the agency has a role to play in the management, coordination, and efficiency of government grants and contracts, but this rule far exceeds these administrative goals. Without any demonstration of fraud or abuse, OMB has taken it upon itself to promulgate a rule that treads on the field of legislating. The Congress, while recognizing the issue and taking steps to address it, has never seen fit to delegate its authority in this area to any executive agency. Further, the revision is so profound that it will generate fundamental changes, previously only enacted through statutes. In effect, OMB is dictating to the Congress who can and cannot provide you with the statistics, information, and experience gleaned from the implementation of the programs and policies you have enacted. We deliver the services, conduct the studies, and obey the laws, yet this rule will prevent us from reporting back to you on their impact. It would seem to us that OMB has trespassed not only on the Congress' exclusive lawmaking power, but also on your oversight responsibilities and desire for feedback, information and advice. This apparent arrogation of authority is made even more egregious when the burden on First Amendment rights is examined.

First Amendment Rights

Notwithstanding, OMB's failure to illustrate abuse sufficient to warrant the currently proposed mammoth changes, its intention to do so is clearly unconstitutional and an irresponsible and irrational infringement upon First Amendment rights.

OMB states that the current proposal "will promote the First Amendment value that a person can freely speak, or refrain from speaking on political matters." and that it "is designed to balance the First Amendment rights of federal grantees and contractors with the legitimate governmental interests of ensuring that the government does not subsidize, directly or indirectly the political advocacy activities of private groups or institutions." The mere statement of that principle neither dictates the confines of this specific proposal nor deems its inherent restrictions legally and constitutionally sound.

In order for the proposed amendment to pass constitutional muster, it must survive two exacting criteria. (1) The rule must forward a compelling governmental interest, Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), and (2) the rule must be drawn narrowly so as not to infringe upon protected rights, Buckley v. Valeo, 424 U.S. 1 (1976). This proposal survives neither test.

The OMB notice states that its interest is in prohibiting the direct or indirect subsidizing of political advocacy activities with federal funds. Yet no such interest in making the sweeping restrictions as proposed has ever been expressed by Congress in any legislation or by the President in any Executive Order. Furthermore, the notice was issued with at the benefit of hearings and without any record of evidence or findings.

The fact is that the Supreme Court has often objected to the

government's preclusion of certain types of speech on the basis of its content. In First National Bank v. Bellotti, 435 U.S. 765 (1978), the Court recognized the importance of advocacy and stated that "...the fact that advocacy may persuade ... is hardly a reason to suppress it: the constitution protects expression which is eloquent no less than that which is unconvincing."* Further, the Court has emphatically objected to discrimination against persuasive speech by declaring that "...above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."* More importantly, the Court and Congress have actually gone beyond protecting advocacy they have recognized and encouraged the need for advocacy in the public interest. The Congressional Research Service reports that "The Supreme Court has noted as a general concept our profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide open (New York Times v. Sullivan, 376 U.S. 254, 270 (1964)), and has specifically upheld legislation to use public money to facilitate and enlarge public discussion ... (Buckley v. Valeo, supra. at 92-93). The legislation adopted by Congress which was upheld by the Court in that case provided for public tax revenues to be distributed to private political campaigns to directly subsidize the political advocacy of presidential candidates."

OMB attempts to justify the government's interest in promulgating this rule by asserting that "This proposal will ensure, that taxpayers are not required, directly or indirectly, 'to contribute to the support of an ideological cause (they) may oppose'." This rationale,

* Comments of ACLU, February 24, 1983, p.9

however, is directly rebutted by Buckley v. Valeo, which affirmed the use of federal funds for the financing of presidential political campaigns. The Court in Buckley recognized that no congressional apportionments are enacted to the satisfaction of all taxpayers and found the use of "public" money to facilitate and enlarge public discussion ... furthers, not abridges, ... First Amendment values." 424 U.S. et. 92-93.

In the absence of existing evidence of abuse and recognizing the legislative and judicial history of the treatment of advocacy, OMB has plainly failed to exhibit any compelling governmental interest in promulgating the present rule.

The second test the rule must pass concerns its precision in dealing with the stated problem and the rule must be drawn narrowly to avoid reaching and infringing upon other protected rights. This test the rule fails miserably.

Under current rules, a federal contract employee who spends 10% of his time on political advocacy activities could change the federal contract for 90% of his compensation as long as the other 10% was paid for with non-government monies. OMB's approach not only affects that employee's political activities but also reaches his non-political activities; for OMB would disallow reimbursement for the 90% of the employee's time spent on authorized contract work. Given that appropriate legislation has already focused on the abuse of funds and that A-122's present cost allocation system dictates that federal funds be used only for federally authorized activity, there is no justification whatsoever for the attempt to totally restrict the activities,

use of equipment, machinery or office space, simply because they are connected at some point in time with political advocacy. It is ludicrous to assume that an organization that delivers employment training services for the government would not feel obligated in some fashion to advocate for the needs and benefits of the clients it served.

On the other hand, OMB's treatment of the definition of political advocacy is equally egregious. It has defined the term so that it covers virtually every form of expression possible between a nonprofit organization and government. The First Amendment's requirement of narrow construction where governmental restrictions on speech are concerned demands that such restrictions not be crippled by a vagueness that necessarily leaves violation to the prejudicial determination of government officials. But that is exactly what this open ended definition of political advocacy constitutes.

The combination of the overbroad application of the new cost-disallowance rule and the vagueness of the term political advocacy would necessarily restrict non-political activities. Neither non-profits nor government monitors would have sufficient guidelines to determine violative activity. The rule would encourage nonprofits to curb all activities for fear that some conversation would be deemed an "attempt to influence" a legislative body or that some employer's membership in an advocacy organization would be considered the result of the employer's inducement.

Finally, the rule if implemented would clearly and unfairly discriminate against certain nonprofits. First, the proposal would require

that organizations "separate their grant or contract activity from their political activity." While that appears a simple edict, it in essence requires that nonprofit organizations finance separate facilities, equipment, and staff. Not only is this duplication a direct contradiction of the rules' stated preoccupation with "efficiency" of effort, but it also makes doubtful the alleged concern with a "balance" of individual and governmental interests. Obviously, the larger and more financially secure organizations are in a better position to set up separate operations than smaller organizations. Thus it is actually the small nonprofits that will be forced to choose between service delivery and advocacy while organizations with the largest budgets are free to continue the exercise of First Amendment rights.

Unlike the IRC, which governs the tax exempt status of federal contractors, this rule would deny organizations the opportunity of self-defense lobbying. Self-defense lobbying allows groups to engage in political advocacy for the purpose of defending their own existence, duties, or power. This right will be virtually foreclosed to those organizations that simply cannot afford a duplicate staff to undertake a defense.

Second, the notice makes a clear distinction between organizations that advocate on their own initiative and those that advocate at the request of the government. The Amendment specifically excepts organizations that supply "advice or assistance" to the government pursuant to the government's request from the definition of "political advocacy." Consequently one set of groups will have the opportunity to influence the legislative process while those uninvited will have no forum.

The legal and administrative shortcomings of this proposal force us to question the sincerity and motivation of the authors of the circular. If their goal is truly the efficient and effective administration of federal funds, why require the duplication of effort it entails and structure such sweeping changes that would necessitate an infinitely more costly system of federal monitoring? If OMB is actually concerned with the preservation and balance of individual First Amendment rights and governmental interests, why then do they blatantly propose to dictate the use of an organization's own funds and deny reimbursement for non-political activity? Why was there so little attention paid to existing congressional intent which in no way indicates a desire to so severely curtail the activities of nonprofits? Why did OMB neglect to focus and tailor its proposal narrowly enough to avoid the constitutional problems of overbreadth and vagueness. Finally, what fairness is reflected in OMB's intention to clearly place political advocacy in the hands of financially robust organizations as opposed to those whose budgets will not withstand a total duplication of effort.

Impact on Small Organizations

By broadening the definition of advocacy, OMB tramples on daily and vital community outreach activities of the National Urban League on behalf of the poor and disadvantaged. A random survey of the League's community activities in its 118 affiliate cities reveals the breadth of the OMB Circular and the jeopardy it holds for federal contract services needed by our constituents.

In EDUCATION...

The Baltimore Urban League actively participates in the decision-making process of the Baltimore public school system -- a system in which black comprise approximately 60 percent of the enrollment. The Baltimore Urban League is asked to join a search committee established to fill the position for a new school superintendent. Additionally, the Baltimore Urban League represents minority interest-through its membership on three key school board advisory panels on transportation, absenteeism and school budgets. The OMB Circular would prevent this land of activity.

In EMPLOYMENT...

The Nashville Urban League negotiates with a major area employer regarding the company's discriminatory hiring practices. Aided by media interviews and public awareness activities, and in conjunction with the local branch office of the Equal Employment Opportunity Commission, the League is able to improve minority access to the company's personnel divisions. The OMB Circular would deter this kind of activity.

In HOUSING...

The Rochester Urban League responds to the growing charges of racial steering in real estate by launching its own investigations. An extensive research report results, and is circulated widely in the local area. Public awareness efforts and coordination help lead to a voluntary agreement with the local Real Estate Board. The OMB Circular

would deter this kind of activity. In Social Services, a region-wide effort is made to educate the minority community on the problem of teenage pregnancy. In conjunction with local churches, school and welfare systems, the Urban League begins to initiate a major awareness campaign at the grass roots level. The OMB Circular would deter this kind of activity.

What these samples illustrate is how vitally the Urban League is involved in the day to day concerns of this nation's poor and minority population. Jeopardizing that network jeopardizes our country's commitment to the disadvantaged.

What makes the Urban League's message important is that when the Urban League speaks, it speaks with experience -- the experience we've gained from over 72 years of grass roots program operations. To quiet that voice is to waste a time-tested resource that functions efficiently and cost-effectively.

Administration's Volunteerism Initiative

These inevitable changes in service delivery mechanisms will also, very simply, choke off any ability we might have had to respond to the President's desire to expand the role of the voluntary sector in addressing the needs of communities. As a participant in the President's Task Force on Private Sector Initiatives, I am very familiar with what Mr. Reagan was trying to foster. Among other things, the group was charged with the responsibility to "... help encourage more private contributions of both human and financial resources to the progress of America's communities." More specifically we were

to recommend means to "identify and eliminate impediments to private initiatives" and "explore and improve incentives used to encourage private initiative." Ironically, now we are presented with a revision in Circular A-122 which will not only erect new impediments to our contributions, but will also tie our hands and make it virtually impossible to maintain our existing level of service, much less any increase.

This contradiction cannot be explained away by cost considerations either. In fact, the revision will impose new expenses on the government. We have traditionally been able to share the costs of equipment; now the contract will have to assume the full price of telephones, typewriters, copying machines, and any other items used in daily office operations. This is hardly an efficient use of the public's assets, both in money and time. Cumbersome bookkeeping procedures will be necessary, which will only serve to divert already limited resources from direct service delivery. Rather than less bureaucracy, less red tape, and less regulation, both the government and the contractor will be faced with increasingly complex and uncalled-for procedures.

Enforcement

Because OMB has offered no concrete guidelines for enforcement of the new Circular, one is lead to question how such a sweeping edict could be enforced. The breadth of the regulation will undoubtedly lead to one of two unreasonable extremes--either so few agencies will be examined that it will lead to charges of harassment, or so many will be reviewed that auditors will be unable to carry out any of their other duties. The spectre of abuse and intimidation

is raised when such seemingly unlimited and ambiguous authority is granted to any agency.

Further, the rules suggest that in the pursuit of alleged violations, OMB would have access to all of an agency's accounts and personnel. There are a number of other unanswered questions pertaining to enforcement, such as: How will OMB determine if an employee paid with grant monies was "induced" to engage in political activities? How will they determine what constitutes five percent of office space and if it was devoted to political advocacy? And why is five percent a valid benchmark? Will there be a standardized procedure for taking action against a contractor who has been found in violations?

Conclusion

For over 70 years, the National Urban League has strived to achieve equal opportunity for blacks, the poor and others whose voices are so often neglected. For approximately 10 years, we have been assisted in these efforts through the acquisition of federal contracts which provide needed services to the poor--services such as job training, housing counseling, and educational assistance. We have been awarded these contracts because we have a track record which shows that we do an efficient and cost-effective, and above all, needed job.

Now it seems without reason or validity that our application of federal support is being questioned. We do not accept this sudden reversal and skepticism, and therefore submit that OMB's proposed revision is both unnecessary and unconstitutional. For a certainty, it dramatizes a disparity in the actions versus the words of an administration which professes to be an advocate of greater voluntarism and community efforts.

Nevertheless, the National Urban League has every intention of continuing to provide direct services to minorities and the poor--as we've done for seven decades. Furthermore, we believe that in order to provide these services we must continue to advocate why they are so greatly needed by those who continue to be left out of the economic mainstream.

Mr. BROOKS. Thank you very much and now I might ask you one question, if you would be willing.

Ms. COOPER. Certainly.

Mr. BROOKS. If local chapters of organizations such as yours are compelled to duplicate facilities and personnel in order to comply with an OMB proposal, do you foresee an increase in the cost of delivering services, both to the Federal Government and to others, to the recipients?

Ms. COOPER. The National Urban League has 118 affiliates and in some of those very small affiliates, there would be a choice between Federal dollars and advocacy, point blank. Some of those affiliates have staffs of two and three people. We have a few large ones, Chicago, San Francisco, and so, but the average size of those 118 is five people—some below five and some above five, and those choices would be very hard to defend to the community that they serve.

Mr. BROOKS. I want to thank you very much. I appreciate your coming down and contributing to this hearing.

Now, our next witness is Thomas S. Deans, the executive director of the Appalachian Mountain Club of Boston, Mass. He has been a member of the staff of AMC since 1964 and has served as executive director since 1975. He has served on the Appalachian Scenic Trails Advisory Council, the Standards Committee, and the board of directors of Citizens for America's Endangered Wilderness. He is also active in the Environmental Defense Fund, National Trails Council, Sierra Club, and the Wilderness Society.

He is a graduate of the University of Maine, and he lives in Intervale, N.H. Welcome, Mr. Deans.

STATEMENT OF THOMAS S. DEANS, EXECUTIVE DIRECTOR, APPALACHIAN MOUNTAIN CLUB

Mr. DEANS. Thank you, Mr. Chairman. I would ask that all of my remarks be entered as part of the record.

Mr. BROOKS. Without objection, so ordered, and the gentleman will proceed.

Mr. DEANS. Mr. Chairman, since its founding in 1876, the Appalachian Mountain Club has been a leader in the establishment and management of public and private lands and facilities for outdoor recreation. We pride ourselves in our relationship, our working relationship with many State, Federal and local agencies and the public service it has provided through those partnerships.

We could give numerous examples of our work with these agencies, and one I might add, Mr. Chairman, we are working with the Texas Trail Association, a good group in your State. We are appalled that President Reagan on one hand calls for improving the public-private partnerships, and for strengthening the volunteer sector, and the State and local agencies so that they can assume a greater role in the delivery of services, and at the same time promulgates administrative regulations that to us appear to stifle and even prohibit some of those partnerships. With Independent Sector and many of the other groups we work with, we have worked hard over the last couple of years to see that these partnerships are strengthened and improved. In fact, the Appalachian Mountain

Club recently received a Richard King Mellon Foundation grant to take our model of partnership out to other parts of the country to help strengthen the relationship that our voluntary groups can have with their State counterparts and Federal counterparts.

Mr. Chairman, I was surprised to hear this morning from Mr. Wright that it was small nonprofit voluntary groups that have problems with living up to the current regulations. He has never talked, or no one from OMB has ever talked to anyone that I am aware of in those small nonprofit, volunteer groups and I agree with you and I appreciate the comments from you and the other members of the subcommittee to the representatives from OMB about getting out and talking to those groups that will be affected by the regulations and changes that they are talking about.

Mr. Chairman, the voluntary groups of this country are working hard to see that their role is strengthened and that they do their part in carrying out the public service obligations that we all feel, and we look forward to continuing that. We do feel that the changes that were suggested to Circular A-122 would run counter to this thing that we are all working together on. Thank you very much, Mr. Chairman.

[Mr. Deans' prepared statement follows:]

STATEMENT OF THOMAS S. DEANS
EXECUTIVE DIRECTOR OF THE APPALACHIAN MOUNTAIN CLUB

BEFORE THE SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY
OF THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

ON OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-122
Cost Principles for Nonprofit Organizations

March 1, 1983

Mr. Chairman, members of the Subcommittee on Legislation and National Security, I am Thomas S. Deans of Intervale, New Hampshire, Executive Director of the Appalachian Mountain Club.

The Appalachian Mountain Club is an association of 28,000 volunteers, principally in the northeastern states, organized to establish and manage protected land areas and waterways to preserve their natural beauty and integrity, and provide appropriate public access. To accomplish this objective, we provide recreational activities, educational programs and supporting facilities, with increased emphasis on urban and suburban areas. We provide the volunteer organizational structure to support this purpose and make our organizational expertise available to others.

On behalf of the Appalachian Mountain Club I appear today to request that this committee join with us in urging the Administration to withdraw OMB Circular A-122.

The revisions are intended to prevent the use, directly and indirectly, of federal funds for political advocacy by grantees and contractors. The effect of the circular would be to prohibit the use for advocacy on non-federal funds as well.

In addition, prohibited "political advocacy" activities would be greatly expanded far beyond any restrictions currently imposed by Congress even to include "influence [of] governmental decisions through communications with any member or employee of a legislative body, or with any governmental official or employee who may participate in the decision-making process." [para.

33(b)(4), emphasis added].

For instance, communications with a federal agency concerning proposed regulations (or, indeed, submission of comments to OMB itself regarding future amendments to Circular A-122), or communications with a state or municipal planning commission concerning a proposed land use plan would equally constitute "political advocacy."

Since its founding in 1876, The Appalachian Mountain Club has been a leader in the establishment and management of public lands and facilities for outdoor non-motorized recreation. It played a dominant role in the formation of both the U. S. Forest Service and the National Park Service, the enactment of the National Scenic Trails Act, the establishment of the 2200-mile Appalachian Trail and both state and national legislation concerned with the wise stewardship of our outdoor heritage.

The special relationship we have built over the years with the White Mountain National Forest in New Hampshire is a model of public-private partnerships, so much so that the R. K. Mellon Foundation of Pittsburgh has underwritten a project to replicate that relationship in all parts of the country with other nonprofit organizations and federal and state agencies. The U. S. Forest Service has contributed a staff person and his expenses to that project in support of the partnership. Under this grant from a private foundation we currently have pilot projects on public lands in the states of Florida, Georgia, New Mexico, Colorado, Washington, Pennsylvania, Ohio and two in California. Response to this innovative project has been overwhelming. As an example, the Albuquerque New Mexico project involves the U. S. Forest Service, the U. S. Soil Conservation Service, the Albuquerque Parks and Recreation Department, and a coalition of the New Mexico Ski Touring Club, the volunteer Open Space Task Force, the New Mexico Mountain Club, the Audubon Society, the local chapter of the Sierra Club and other individual volunteers.

We, like many other volunteer environmental/conservation nonprofit organizations, are seriously threatened by the proposed modifications in OMB Circular A-122. We pride ourselves in our work with and for state and federal agencies, especially their staff, in order to ensure that their guidelines, rules, administrative procedures, etc. are "ecologically sound, socially responsible and economically feasible." And we from time to time are reimbursed for on-the-ground services we provide these agencies. For instance, the Supervisor of the White Mountain National Forest has worked with our assistance preparing unit plans for the Forest, and the A.M.C. maintains some 350 miles of hiking trails and shelters on public lands under a cooperative agreement with the Forest Service.

If the OMB modifications were adopted, this mutually advantageous arrangement could become illegal, and present federal budget restrictions would prevent the Forest Service from providing these public services.

We could give numerous other examples of work with all sorts of state and federal agencies helping to manage outdoor recreational opportunities, and the devastation such proposed regulations would cause. We are appalled that President Reagan, on the one hand calls for improving public-private partnerships, for strengthening the volunteer sector and state and local agencies so they can assume a greater responsibility for the delivery of public services heretofor provided by the federal government, and at the same time, promulgates administrative regulations that stifle, even prohibit, those same partnerships!

We urge you and your staff to make every effort to ensure that such potentially destructive regulations never take effect. We ask for your help in preserving those volunteer organizations so unique to our nation and that benefit both the individual states and the whole country.

Thank you for your attention.

Mr. BROOKS. Thank you, and I have one question. How would this proposal affect nonprofit organizations like your own from delivering services at the local level?

Mr. DEANS. Mr. Chairman, I noticed just a day or so ago in the Federal budget proposal for 1984 for the Department of Agriculture that that agency alone is counting on 50,000 volunteers to contribute \$22 million worth of conservation work in 1984. To do that they are going to have to work in partnership and unison with the Federal agencies, and there will be some sharing of services. I think if the administration is going to accomplish some of their own goals, this program here will run counter to that at the local level with the small trail groups that we find all over this country.

Mr. BROOKS. I thank you, Mr. Deans.

Mr. DEANS. Thank you, Mr. Chairman.

Mr. BROOKS. Our next witness is Paul A. Kerschner, associate director of the division of legislation of the American Association of Retired Persons. Prior to joining the staff of AARP, he was a director of the community programs of the Gerontology Center at the University of Southern California. He also worked for the Social Security Administration and the Governor's Commission on Nursing Homes in Maryland.

He has a masters and doctorate in public administration from the University of Southern California. We will be delighted to put your remarks in the record and to hear your comments, Mr. Kerschner.

STATEMENT OF PAUL A. KERSCHNER, ASSOCIATE DIRECTOR, DIVISION OF LEGISLATION, AMERICAN ASSOCIATION OF RETIRED PERSONS

Mr. KERSCHNER. My legitimacy, Mr. Chairman, is that my wife was born in Borger, Tex.

Mr. BROOKS. Borger, Tex. Wonderful.

Mr. KERSCHNER. Mr. Chairman, the American Association of Retired Persons feels that issues of left and right ideology should be fought in the hills of New Hampshire, not promulgated in the dark caves of the Office of Management and Budget.

Let me stress at the outset that the American Association of Retired Persons fully supports the objective denying use of Federal grant funds for political advocacy. We have never done that, and will never do so. Our Federal and State legislative departments are entirely funded from association sources. The cost of copying, personnel, postage and any other activity related to political advocacy is paid exclusively from AARP funds.

So broad is the scope of these proposed regulations, however, and so detailed is their specifications, that one must wonder if the defined goal is the real one. Is the goal truly to prohibit use of Federal funds for political advocacy, or is it to limit political advocacy itself? Or is the goal perhaps to establish a mechanism for denying funds to certain programs Congress has mandated, but which the administration disfavors?

Such questions of motivation are inevitably raised when one analyzes the proposed sanctions against the perceived evil. The proposed regulations are grossly disproportionate. They are disruptive

and potentially mischievous. They are possibly unconstitutional and they are clearly a usurpation of congressional authority.

Existing laws established by Congress already address the basic issues raised by these regulations. The Internal Revenue Code sets certain limits on lobbying expenditures for private nonprofit organizations. Congress has in the past, where it has deemed appropriate, proscribed certain political advocacy activities as part of its appropriations process.

While we claim no special competence to judge the constitutional issues involved, it appears to us that these proposed regulations exceed OMB's statutory authority. Surely OMB has legal authority to develop regulations to implement laws enacted by Congress, but it has no basis for engaging in lawmaking on its own. A legal memorandum from the Washington law firm of Caplin & Drysdale states, and I quote:

A strong legal argument can be made that OMB has no statutory authority for the proposed restrictions on lobbying and other participation by nonprofit grantees in the governmental decisionmaking process.

To illustrate the disruptive and potentially mischievous nature of the proposed regulations, consider their restrictions on building utilization. Under the proposal, Federal reimbursement for the costs of building and office space would be disallowed when 5 percent or more of the office space is devoted to political activity, even if these costs are carefully monitored and properly allocated.

If an organization has for example, as we do, a title V Senior Community Service Employment project, housed in the same building with a legislative advocacy unit, one activity or the other might have to move into another building. How such disruption and increased costs help to achieve the defined goal escapes us, Mr. Chairman.

Similarly, the proposed regulations would deny reimbursement for an individual employee's administrative costs for a Federal grant program, if that employee devoted any time to political advocacy, even if those costs are carefully monitored and properly allocated. One reason we and other grant administrators are able to keep administrative costs down is the part-time assignment of experienced managers to grant supervision. Beyond the increased costs such a regulation would impose, it also raises—according to Caplin & Drysdale—some questions about first amendment rights.

That which will be most troublesome to this committee—and all Members of Congress, we suspect—is the greatly expanded definition the proposed regulations give to political advocacy. They would not only include lobbying in the classical sense, but would also apply to public interest litigation as a friend of the court or any effort to influence Government decisions through communication with any member or employee of a legislative body, or with any governmental official or employee who may participate in the decisionmaking process.

Strictly enforced, such a restriction would appear to preclude any grant administrator, or grant participant, from talking with a Member of Congress, or a congressional staff member.

Restricting such communication could deny Congress its legitimate oversight responsibility while further eroding first amendment rights.

Because of these reasons, and others, AARP urges your committee to suspend the effective date of the proposed regulations, allowing Congress sufficient time to review all the legal, administrative and financial issues involved.

We recommend that followup hearings be held to determine whether, in fact, there is a problem under current law and administrative policies. If there is, then appropriate congressional committees should consider ways to remedy the problem through processes that are both constitutional and cost efficient.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you very much for coming down and give your wife my best. We are delighted to have you here. We appreciate your contribution.

[Mr. Kerschner's prepared statement follows:]

STATEMENT
OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS
PRESENTED BY
PAUL A. KERSCHNER

Mr. Chairman, members of the committee.

We applaud your committee for conducting these early hearings on the proposed OMB rules relating to federal grants and political advocacy.

By defining a noble goal, but prescribing a faulty means of achieving that goal, they confront you---and all grant administrators---with an interesting dilemma. To oppose the rules because of the faulty means runs the risk of being misunderstood.

So let me stress at the outset that the American Association of Retired Persons fully supports the objective of denying use of federal grant funds for political advocacy. We have never done that, and would never do so. Our federal and state legislative departments are entirely funded from Association sources. The cost of copying, personnel, postage and any other activity related to political advocacy is paid exclusively with AARP funds.

So broad is the scope of these proposed regulations, however, and so detailed is their specifications that one must wonder if the defined goal is the real one. Is the goal truly to prohibit use of federal funds for political advocacy, or is it to limit political advocacy itself. Or is the goal, perhaps, to establish a mechanism for denying funds to certain programs Congress has mandated, but which the Administration disfavors?

Such questions of motivation are inevitably raised when one analyzes the proposed sanctions against the perceived evil. The proposed regulations are grossly disproportionate. They are disruptive and potentially mischievous. They are possibly unconstitutional. And they are clearly a usurpation of Congressional authority.

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If an organization has, for example, a Title V Senior Community Service Employment project housed in the same building with a legislative advocacy unit, one activity or the other might have to move into another building. How such disruption and increased costs could help achieve the defined goal escapes us.

Similarly, the proposed regulations would deny reimbursement for an individual employee's administrative costs for a federal grant program if that employee devoted any time to political advocacy, even if those costs are also carefully monitored and properly allocated. One reason we and other grant administrators are able to keep administrative costs down is the part-time assignment of experienced managers to grant supervision. Beyond the increased costs such a regulation would impose, it also raises---according to Caplin & Drysdale---some questions about First Amendment rights.

That which will be most troublesome to this committee---and all members of Congress---, we suspect, is the greatly expanded definition the proposed regulations give to "political advocacy."

They would not only include lobbying in the classical sense, but would also apply to public interest litigation as a friend of the court or any effort "to influence government decisions through communication with any member or employee of a legislative body, or with any governmental official or employee who may participate in the decision-making process."

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Restricting such communication could deny Congress its legitimate oversight responsibility while further eroding First Amendment rights.

Because of these reasons and others, AARP urges your committee to suspend the effective date of the proposed regulations, allowing Congress sufficient time to review all of the legal, administrative and financial issues involved.

We recommend that follow-up hearings be held to determine whether, in fact, there is a problem under current laws and administrative policies. If there is, then appropriate Congressional committees should consider ways to remedy the problem through processes that are both constitutional and cost-efficient.

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Mr. BROOKS. I suggest that we hear Mr. Botwinick from the Corcoran Gallery, and then we break for lunch and come back at 1:30 and continue to hear the remainder of our witnesses. If this is acceptable, I believe that is the best way to operate.

Mr. Botwinick is director and chief executive officer of the Corcoran Gallery and the School of Art here in Washington. He represents the American Association of Museums as a member of their executive council.

He holds a B.A. from Rutgers College and an M.A. from Columbia, both degrees in the arts area. After working as a college instructor, he held positions with several museums. In addition he is active in a number of professional organizations.

We are glad to have you here.

STATEMENT OF MICHAEL BOTWINICK, DIRECTOR, CORCORAN GALLERY OF ART, WASHINGTON, D.C.

Mr. BOTWINICK. Thank you, Mr. Chairman. I will try to be mindful of the fact that everybody would like to get to a break and with your permission summarize briefly my remarks.

Mr. BROOKS. Without objection, your statement will be made a part of the record and we will hear your comments.

Mr. BOTWINICK. The museum community is deeply concerned about the impact of these proposals on our capacity to function effectively in our communities and States, and to assure our long-term capacity to preserve precious cultural resources for the Nation.

Among the many major philosophical and legal problems that might be raised by the regulations, I would like to cite three problems of a more practical nature that we view as unworkable and in many senses unjust.

As the proposed regulation is now written, there is no balance struck between the percentage of support an institution receives from the Federal Government and the amount of advocacy it undertakes or how these regulations would affect that. If a director or curator receives 5 percent of his salary through the overhead provision of a Federal grant, the regulation would disqualify the other 95 percent of his time for use in any type of advocacy.

Second, the proposed regulation expands the definition of advocacy beyond legislative activity to include commenting on regulations and supporting legal actions with implications for an entire class of organization. It also expands the prohibition against advocacy to include activities undertaken at the State and local level. In this last regard the regulation is particularly unsound. Both the nature of Federal support to museums and the legal obligations of museums as public trusts regulated by the States make this change untenable for most museums and most of the cultural community.

Last, the inclusion of indirect or overhead costs, that are part of a Federal grant or contract as triggers in the application of these rules, would be incapacitating for most nonprofit organizations, particularly museums.

Federal support represents a very small percentage of any museum's budget. In the aggregate we estimate that it represents less than 5 percent of the total of museum operating budgets through-

out the country. The portion of Federal support that goes toward overhead is probably less than 1 percent, given the generally low indirect cost rates that we all have negotiated with our Federal agencies.

For this small percentage of indirect cost reimbursement from the Federal Government an entire museum and its staff is disqualified for undertaking any advocacy efforts either on its own behalf or on behalf of the museum community.

I think that I would digress and just suggest to you a few of the areas in which the museum community would have been ineffective in things that would have been directly affected by this regulation.

To begin with, the very existence of both the National Endowment for the Arts and National Endowment for the Humanities would be called into question, if we were operating under this regulation. We all took part in a national debate on these issues through the Belmont Commission and in a series of other reports that defined the area in which the Federal Government was going to get involved in support of museums, the arts, and the humanities.

More recently, in conjunction with the Institute of Museum Services, the museum community commented effectively on their program to support efforts to improve professional standards for museums to provide that very agency with a method of arriving at qualitative judgments on the effectiveness of museums.

Several years ago when the Department of Energy issued regulations with regard to energy usage in institutions, we found ourselves with zoos and botanic gardens whose very charges were threatened by those regulations. Rare species of plants and animals were not finally subject to energy cutbacks but these comments that resulted in this exemption would have been impossible under these regulations.

Enabling legislation for the UNESCO convention prohibiting the illicit transport of works of art which was an issue in this Congress for nearly a decade would never have been passed without the effective advocacy of the museum community which from a professional point of view helped outline and define the issues involved.

On the State and local level, many museums using the rigorous matching requirements of the national endowments' challenge grant programs have created effective partnerships with their State and local governments which have allocated State and local resources in partnership with Federal and private resources. Without the ability to make a real claim on the importance of the museums and other cultural institutions, without the ability to develop positions that point out that this is a public good, these partnerships would indeed, in my judgment, often not come to fruition.

The effect of the regulation would be so wide ranging in fact that evenhanded enforcement would probably be impossible. None of the organizations that are reflected within the American Association of Museums has the capacity to undertake the kind of separations or audits that would result and we would all be faced with making a kind of a Hobson's choice. We are already severely, and we think properly, constrained in the area of political activity by the IRS regulations. Our 501(c)(3) ruling is far more precious to us

than let us say the \$35,000 we receive from the Institute of Museum Services. The notion that there is a rampant problem in the private sector I think has been demonstrated to be misinformation today. The suggestion that these regulations are recommended in order to defend first amendment rights and are based on, and I quote from the circular, a "concern for protecting the free and robust interchange of ideas" seems to me to be a kind of a rhetorical chicanery. Thank you.

Mr. BROOKS. I want to thank you very much for a fine statement, Mr. Director. We appreciate your coming down, and making a contribution to show the breadth of this effort to restrict and make more difficult the exercise of freedom in this country.

[Mr. Botwinick's prepared statement follows:]

Testimony of Michael Botwinick
Director, Corcoran Gallery of Art
on behalf of
American Association of Museums

Mr. Chairman and members of the committee:

I would like to thank you for the opportunity to express my reservations and those of the museum community concerning the revisions to Circular A-122 proposed by the Office of Management and Budget. My name is Michael Botwinick. I am the director of the Corcoran Gallery of Art, a position I have held since December, 1982. For eight years, I was the director of the Brooklyn Museum. I am here today in my capacity as a museum director with extensive experience with federal grants and as a representative of the American Association of Museums, an organization with a membership of 7000 museums, museum professionals and trustees.

The museum community is deeply concerned about the impact of the proposed revisions on their capacity to function effectively in their communities and states, and to assure their long-term capacity to preserve precious cultural resources for the nation. Among the many major philosophical and legal problems raised by the regulation, I would like to cite three problems of a practical nature that we view as unjust and unworkable.

1. As the proposed regulation is now written, there is no balance struck between the percentage of support an institution receives from the federal government and the amount of advocacy it undertakes. If a director or curator receives five percent of his salary as part of a federal grant, the regulation would disqualify the other 95 percent of his time for use in any type of advocacy.

2. The proposed regulation expands the definition of advocacy beyond legislative activity to include commenting on regulations and supporting legal actions with implications for a class of organizations. It also expands the prohibition against advocacy to activities undertaken at the state and local level. In this last regard, the regulation is particularly unsound. Both the nature of federal support to museums and the legal obligations of museums as public trusts regulated by the states make this change untenable for museums and most of the cultural community.

3. The inclusion of indirect or overhead costs that are part of a federal grant or contract as "triggers" in the application of these rules is incapacitating for most nonprofit organizations, particularly museums. Federal support is a very small percentage of any museum's budget. In the aggregate it is less than five percent of total museum operating budgets. The portion of that support that goes to indirect or overhead costs is probably less than one percent given the generally low indirect cost rate most museums have negotiated with federal agencies. For this small percentage of indirect cost reimbursement from the federal government, an entire museum and its staff is disqualified from undertaking any advocacy efforts either on its own behalf or on behalf of the museum community.

To understand the implications of the proposed regulation on museums and most of the cultural community, I would like to describe briefly the nature of federal support to museums and examples of the types of advocacy museums undertake.

The principal agencies that fund museums are the Institute of Museum Services, the National Endowment for the Arts and the National Endowment for the Humanities. Some support for basic research and collections is available to science museums through the National Science Foundation.

The Institute provides small grants for general operating support to approximately 500 museums each year. Until fiscal 1983, grants from IMS were for \$35,000 or less; the maximum this year goes to \$50,000. At the endowments, grants are available for special projects, such as exhibitions and conservation, and for challenge grants--special grants that require a match of three new, nonfederal dollars for each dollar of federal support provided.

Probably the most obvious and unfair adverse consequence to cultural institutions of the proposed regulation is in the area of NEA and NEH challenge grant support. Those on the committee with major cultural institutions in their districts may be aware of challenge grants and their impact over the five years they have been awarded. In some ways these grants are the model of what a federal program should be. The goal is to insure sound financial management and the long-term health of cultural organizations through broadening the base of support. For each federal dollar awarded, a museum, must raise three new dollars from individuals, corporations, foundations, and state and local government. Challenge grant recipients on the average have matched federal funds five to one--an impressive record. The challenge of these grants is not just to locate a certain amount of new money in a certain period of time, but to alter fundamentally the pattern of support for cultural institutions. Both of the museums I have directed have had challenge grants, and I can testify to their impact on museums and their sources of support.

The need to generate state and local government funds to match these grants has meant developing persuasive cases for committing precious public money for the cultural well-being of a community or state, in other words effective advocacy. This type of activity, which has been key to increasing support for cultural activities at the state and local level, is seriously compromised by the proposed regulation.

Another example of the impact of the proposed regulation, and one that illustrates the institutional "gridlock" that is the logical outcome of the regulation, is the effect of an Institute of Museum Services grant for general operating costs. The Corcoran Gallery has an annual operating budget of \$2.25 million; last year it received a grant for \$35,000 from IMS. The grant became a part of the general operating budget and was used for the ongoing maintenance of our building and programs. It represented approximately 1.5 percent of our budget. Nevertheless, under the proposed regulation our entire budget would be "tainted" for lobbying purposes. We would have to forego our legitimate interest in a variety of regulatory matters, including this one, and important issues of federal cultural policy.

This regulation may have had its start in a correct impulse to avoid federal subsidy of activities that were directed at self-promotion rather than the promotion of the public good. The regulation that emerged does not address the issue except to ban many necessary forms of public expression in the nonprofit community.

The effect of the regulation would be so wide ranging, in fact, that even-handed enforcement would be impossible. None of the agencies I have mentioned has the capacity to undertake the audits that would result. Some might find that a reason to ignore the implications of the regulation and to conclude, that having too much effect, it would have none. That is precisely the reason to oppose it. A regulation that can not be enforced across the board will be enforced selectively. If this regulation is aproved, it opens the way to harassment through audit and forfeiture of grant funds.

The American Association of Museums urges the committee to disapprove this regulation as it is proposed.

Mr. BROOKS. We will stand recessed until 1:30.
 [Whereupon, at 12:40 p.m., the subcommittee recessed until 1:30 p.m., the same day.]

AFTERNOON SESSION

Mr. BROOKS. The subcommittee will come to order.

Next we will hear from June Bucy, the chief executive officer of the National Network of Runaway and Youth Services, Inc. She served for 11 years as the executive director of the Youth Shelter of Galveston, in the Ninth Congressional District of Texas. She also served on the boards of youth services organizations across the State of Texas and the Federal region, and was a member of the Special Select Committee on Child Abuse of the Texas House of Representatives.

She has a very outstanding assistant, her husband.

It is a pleasure to have you with us today. Please proceed.

STATEMENT OF JUNE BUCY, CHIEF EXECUTIVE OFFICER, THE NATIONAL NETWORK OF RUNAWAY AND YOUTH SERVICES, INC.

Ms. BUCY. Thank you. I will not read this whole statement with hope you will put it in the record.

Mr. BROOKS. Without objection, it will be placed in the record.

Ms. BUCY. I am speaking on behalf of the National Network of Runaway and Youth Services and our 600 member programs across the country.

It seems that in all of this criticism of these regulations you have overlooked something pretty important. It is kind of neat for me as a nice little old lady in tennis shoes to feel that OMB feels that your intelligence and your ability to judge is so weak that they need to protect you from me.

Mr. BROOKS. They judge us by themselves, you know.

Ms. BUCY. However, there are some of us who work with programs that deal with clients that are basically not our community's favorite people. We work in programs that will probably never have a whole lot of private money because there are some people in our society whose problems just simply don't attract private money. We need to look at the programs that are doing services for that part of our society that you, as congressional people, have deemed worthy of services, and yet no group of the private sector with private money is willing and able to minister to as you have chosen.

We in the runaway and other youth services see ourselves as being advocates in the dictionary sense of the word, those "people who plead another's cause."

A youngster alone on the street facing hunger or prostitution does not generally call his Congressman. But you and I know that it is the Congress that has provided more aid than has any other source for these children.

If you had not heard advocates' voices who know about these children to help you in understanding the problems perhaps you would not have been a part of that provision.

People wiser than I have covered many of the constitutional questions and the questions dealing with large organizations this

morning. I would like to add just a few things that it seems are important to smaller organizations.

First, I would like to question whether your access to information may not already have been more curtailed than you are aware.

In the attempt to eliminate paperwork, and to give States more freedom to approve their own plans for the use of Federal money, there is much less data about social programs than there used to be.

One might wonder if there is even an attempt to disguise or ignore social problems by eliminating data collection about these problems.

Apparently, what we don't choose to know, we can ignore.

There is limited data, and if professionals working with people are prevented from educating you and the public, your information will be severely limited, and the public debate will not be balanced.

There are no clear-cut answers to the interventions that Government should make in the lives of families. The struggle for the interface of the rights of individual privacy with legitimate public concern is an unending one. The attempt to design and deliver services that meet the genuine need of people in caring, accountable, and cost-effective ways is very likely a struggle that will not be over any time soon.

Speaking on behalf of our programs I would like to say that to us, these proposed revisions seem impractical, impossible, and immoral.

Crisis intervention is often a work of rescuing people. One can only rescue a certain number of people when, if you have any brains at all, you begin to wonder why they keep on being in these situations. Why is there this constant flow of people needing rescuing?

The issues begin to fall into clear patterns when we hear the same stories over and over again.

If we are unable to work with decisionmakers at the local levels in such places as our schools, courts, and welfare agencies to pinpoint suggested changes in procedure, then we will have to continue to deal with problems one on one. Our problems are much too numerous to be approached in that fashion.

I want to address another very practical matter. It has been my experience that when a program creatively meets the needs of a community, the people associated with that program become the experts in that area for that community.

These people are not only expected to appear before decisionmaking groups to provide information and technical assistance, they are often appointed to be members of those same decisionmaking groups.

This situation is not addressed by the proposed circular, but I think in not being addressed it would create uncertainty, and would, therefore, have a chilling effect on responsible participation in the community life by citizens with professional expertise. Were it clearly denied, then again those citizens would not have a way to influence the decisions about which their education and their commitment leads them to have concerns.

For small agencies it would be simply impossible to move to another place with another staff, another phone, another Xerox, to talk about the issues which affect their clients. It would be a waste of time and money, and we never have enough of either.

Finally, our contention is that not only are these proposed changes impractical and impossible, but they are also immoral.

The law in Texas, and in most States, requires the reporting of child abuse. If I know of a child who is being abused or neglected and do not report that maltreatment, I am guilty of a crime.

This law and the child protective system it supports has saved the lives of thousands of children and is recognized as a moral response to an immoral situation.

As a professional youth service worker I know of thousands of troubled children whose lives are endangered and whose future is threatened.

I feel it is my moral duty to speak out. I feel I must work intentionally to inform the general public with the specific intention of creating a climate of opinion that will support changes to protect children.

It is my moral obligation to join with others in advocacy organizations where the information and the judgment of many people can be combined to add to the public debate.

Mr. Chairman, I feel it is my moral obligation as well as my privilege to communicate in a timely fashion, not just a written fashion, with you as a Member of the highest decisionmaking body of this country.

Your rights are restricted if you and your staff cannot call on me and other people who have the information you need.

I trust your wisdom to lead you to take the necessary steps to prevent the enforcement of the proposed revisions.

Thank you for your attention to this.

[Ms. Bucy's prepared statement follows:]

Statement to the
Committee on Government Operations

by June Bucy
Chief Executive Officer

The National Network of Runaway and Youth Services, Inc.

Mr Chairman and members of the Committee, thank you for this opportunity to speak with you today. I am June Bucy and am speaking on behalf of the National Network of Runaway and Youth Services, Inc. The National Network is an organization that counts among its members over 600 independent youth and family service centers in 46 states. The organizational goals are to bring national attention to the needs of youth in crisis and to assist communities to develop cost effective programs of high quality to meet those needs. Most of our members are small programs which were created by civic or church groups responding to the needs of youth and families in their community. Ours is a lively system of people who expend great energy and enthusiasm working with people in crisis and educating the public about the factors that produce crisis situations in the family and the steps that may be taken to reduce the danger and harm to children.

We are advocates in the dictionary sense of the word--those who plead another's cause. A youngster alone on the street facing hunger or prostitution does not generally contact his Congressman. But you and I know it is the Congress that has provided more aid than any other source for this child, and that it is the advocates voice you have heard to assist you in understanding the problems of these families.

Your access to information may well have been curtailed already more than you may be aware. As I was preparing this statement I talked with people from many agencies and organizations. One issue emerged of which practitioners are acutely aware, but that apparently is not well known or recognized by those not involved with the day by day details of service delivery. That issue is that in the attempt to eliminate paper work and to give states more freedom to design and approve their own plans for the use of federal money, there is much less data collected than there used to be. To illustrate this point, let me tell you that for years the federally funded runaway programs were required to complete a data collection survey on each youth receiving service in the centers. That requirement no longer exists--collection and reporting of this data is now optional. One might wonder if there is even an attempt to disguise or ignore social problems by eliminating data collection about these problems. Again I illustrate from the runaway youth programs--the form is four pages long and has 264 questions, not much is unexplored one would think. Yet no where on the form is there a question about sexual abuse a child might have experienced although program providers have found such abuse is a major cause of children running from their homes and a major threat to them on the street. Apparently what we do not choose to know, we can ignore. My discussion with others underlines the fact that diminished data collection and neglect of data in certain sensitive areas is characteristic of many presently funded federal programs.

When you Congressional people are asked to make decisions based on the needs of people, how are you going to know about those needs? If there is limited data, and if professionals working with the people are prevented from educating you and the public, your information will be severely limited and the policy debate will not be balanced.

Decision makers at the federal, state, and local level need accurate information and education. There are no clear cut answers to difficult and confusing questions about how government should assist families. There are few, if any, communities where the design of the social services system perfectly matches the needs of the people--particularly of those people who act in unpredictable ways as adolescents often do. The struggle for the interface of the rights of individual privacy with legitimate public concerns is an unending one. The attempt to design and deliver services that meet the genuine needs of people in caring, accountable, and cost effective ways is likewise a lively struggle. Private sector social, religious, and civic organizations have historically played a role in this arena. Under the present administration they have been called upon by the federal government in its private sector and volunteer initiatives to play a larger role. It is incumbent upon Congress to spell out the ground rules for this participation, and you have done so quite effectively in several pieces of legislation restricting the use of federal funds for political or legislative activities. We understand that legislation and support it enthusiastically. Today, however, we are addressing proposed regulations that seem to lack a statutory base and would substantially alter the relationship between government and the nonprofit community from the present relationship specified by Congress.

The proposed revisions of OMB's Circular A-122 greatly expand the definitions of political advocacy and unallowable activities, and severely restrict your access to information. They propose federal control of the use of private funds by agencies which, often at the request of government, have accepted federal funds to provide services for those whom Congress has deemed in need of them.

If these regulations are enforced, service providers cannot enter into the normal dialogues concerning community issues, and they cannot freely present information gleaned from their experiences to decision makers without the fear that they may be jeopardizing their agency's budget. These service providers, therefore, cannot do their best work. Programs will not be well designed to meet the needs of people. The public will not understand the issues, and the decision makers will not have the data they need to make appropriate decisions.

Speaking on behalf of our member programs and those youth and families we serve, I want to say that to us the proposed revision of Circular A-122 appears to be impractical, impossible, and immoral.

Social workers chose their profession because of their interest in people and their desire to help them better their conditions. Most professionals that I know set about their tasks with no thought of changing the system or of involving themselves in political advocacy--at least as that term has normally been defined. But having "rescued" one child after another from a similar crisis one soon begins

to realize that it would be much more efficient to prevent the crises. For example, many of the children who come to runaway centers list, among their problems, difficulties with their school experience. School failures and expulsions frustrate parents as well as children and the angry accusations may cause a young person to feel unable to cope and unwanted by either the parents or the school. If he runs from this frustration, the police and courts may soon be involved. These issues begin to fall into clear patterns to a youth worker who hears the story over and over again. If that worker or the director of that program is unable to work with the decision makers in the local schools and courts to pin point suggested changes in procedures, then the situation continues to be repeated by student after student. It seems to me that our problems are too numerous to be approached in that fashion. We need to eliminate the dangerous curves and road blocks so that people will not continually crash against those obstructions and become victims that must be rescued.

I want to address another very practical matter. It has been my experience that when a program creatively meets the needs of a community the people associated with that program become the "experts" in that area for that community. These people are not only expected to appear before decision making groups to provide information and technical assistance, they are often appointed to be members of those decision making groups. This situation is not addressed by the proposed revisions in the circular, but it seems to me to be a problem for many service providers that would create uncertainty and would, therefore, have a chilling effect on responsible participation in community life by citizens with professional expertise.

Not only are the revisions impractical, but if enforced, they would make it impossible for many organizations to function. Good management procedures require an accountable Executive Director who is held responsible for the performance of the total agency and its community relationships as well as for the performance of a government funded program. No clear division can be made in delivering social services and in planning, designing, evaluating and redesigning those services. It is suggested that attempts to "influence" decisions about regulations, zoning, or funding can be done by another staff person, in another place, with another phone and another xerox. I doubt that this would be possible in large well funded agencies. I know that it would be impossible for small agencies on the front lines of service delivery. There is simply not enough staff and not enough money for these functions to be that separate. And there are certainly not enough sophisticated book keepers in our agencies to maintain clear records with such complex and unclear guidelines.

Finally, our contention is that not only are the proposed changes impractical and impossible, but they are also immoral. The law in most states requires the reporting of child abuse. If I know of a child who is being abused or neglected and do not report that maltreatment, I am guilty of a crime. This law, and the child protective system it supports, has saved the lives of thousands of children and is recognized as a moral response to an immoral situation.

As a profession youth service worker I know of thousands of troubled children whose lives are endangered and whose future is threatened. I feel it is my duty to speak out.

I must work diligently to inform the general public with the intention of creating a climate of opinion that will support changes in our systems that at present do not protect adolescents in crisis.

It is my duty to participate in community discussions with decision makers and to contribute my understanding to that of others.

It is my moral obligation to join with others in advocacy organizations that combine the information and judgment of many people to add to the public debate. It is an attack on voluntary organizations which are valuable threads in the fabric of our society to rule that the dues paid from private sources to such an organization and that staff participation in that organization paid for by private funds is unallowable if that staff person spends part of her time on a federally funded project.

And, Mr. Chairman, I feel it is my moral obligation as well as my privilege to communicate in a timely fashion with you as a member of the highest decision making body in this free country. Your rights are restricted if you and your staff cannot call on me and other people who have information you need. You know there are problems in this nation, and you know they can be addressed when each of us plays his part and works together. I trust your wisdom to lead you to take the necessary steps to prevent the enforcement of the proposed revisions.

Thank you for your attention to this issue and for allowing me to address it with you with morning.

Mr. BROOKS. Thank you very much, Ms. Bucy.

Would your organization be able to continue in operation with its present structure under the OMB proposal?

Ms. BUCY. You have asked other people that question. So I have thought about it. I have two answers. One is that I just can't conceive of the fact that you are going to let these regulations go into effect, so I can't imagine how it would be if they were.

At another level——

Mr. BROOKS. You have lots of faith.

Ms. BUCY. Absolutely.

At another level, I don't think there is any regulation that anyone could pass that would prevent me from doing everything that I can to make it safer for children and for families to be united in our world today. But, I don't know exactly how we would do that.

Our National Network receives no Federal funds. So as a national body we can speak out and bring together such data and interpret it as it seems wise to us.

Our member programs would probably have a great deal of difficulty, but I think I could say for them, too, that the causes and the children with which we work are so important that we would simply find a way of making their needs known.

I think one of the ways that we might find, and this has not been addressed today, we would use our boards in our local programs as advocates.

You know some of my board members, and know they have rather feisty ways of communicating. If that were the way the communications have to come, I don't know of any rule that could say a private citizen could not use his own time.

I certainly would not have to be required or induced as the proposed version says, to work overtime in order to advocate for children.

So I think no matter how tight the regulations are, truly committed people will find a way to serve those that they care about.

Mr. BROOKS. I know that you are most resourceful and I want to thank you very much for being here.

Mr. Clinger?

Mr. CLINGER. I have no questions. I would like to echo your sentiments. Thank you very much for very helpful and refreshing testimony.

Mr. BROOKS. Our next witness is Mr. Forrest I. Rettgers, executive vice president of the National Association of Manufacturers. He joined the NAM in 1974 and has served in his present position since 1977. He has broad experience in the military, government, and private industry. He has served as Deputy Assistant Secretary of Defense for International Security Affairs and as administrative assistant to Senator Harry F. Byrd, Jr. of Virginia.

Mr. Rettgers holds an M.A. in international relations from George Washington University.

He obviously is a man of rare ability, charm, and poise. We are delighted to have you. You may proceed.

STATEMENT OF FORREST I. RETTGERS, EXECUTIVE VICE PRESIDENT, NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY GARY D. LIPKIN, ASSISTANT GENERAL COUNSEL

Mr. RETTGERS. Thank you, Mr. Chairman. It is always a pleasure to be in front of you. I, for the business community, want to thank you for all the work that you have done in behalf of business, especially the slow-pay bill in the last Congress.

I am the executive vice president of the National Association of Manufacturers, NAM. With me today is Gary D. Lipkin, assistant general counsel of the NAM.

We are most appreciative of the opportunity to appear here today to express the concerns of our membership on the recently proposed revision to OMB Circular A-122.

I would like to set the record straight that in the media when they referred to me as a F-blank-blank B-blank-blank for wanting to take this thing to the Hill, my wife, when she read it, said she was sure that that was a fighting bulldog. I just wanted to be sure that everybody understands that that is what they were talking about.

That comment was made when I threatened to take this to the Hill and the reception that it would receive there.

NAM is a nonprofit, voluntary business association consisting of over 12,500 member firms of all sizes from all parts of the country.

NAM members employ about 85 percent of all employees engaged in manufacturing nationwide and they account for about 80 percent of our Nation's industrial output.

Further, approximately 78 percent of our members are entities that are generally considered to be small business.

Let me make clear at the outset that NAM is not a Government contractor; we do not solicit or accept Federal grants of any type.

OMB's proposed revision to Circular A-122 will nevertheless have an indirect effect on NAM as an entity and a very substantial and deleterious impact on a vast segment of our membership.

So very broad and unrestrained is the OMB proposal that it literally toys with fundamental and cherished first amendment rights. So, too, it has generated a furor the likes of which I have only rarely seen in many years of active participation in the governmental process, and I have been up here on the Hill since 1955.

We are not at all unsympathetic to the objectives sought to be achieved by OMB in its proposal, namely preventing Federal funds from being used for political advocacy or direct lobbying.

As a general proposition, taxpayers' dollars should not be used to directly fund overt partisan activities or lobbying, as those terms are traditionally defined and understood.

Now, we contend that if there have been past abuses in this area, OMB's proposed cure, when viewed in its totality, may prove to be far worse than the suggested disease.

In our view OMB's proposal is rife with legal and practical difficulties, through an overbroad definition of political advocacy and a series of taint rules which can only be characterized as draconian in nature. The very constitutionality of OMB's proposal is thus called into question.

Consider for a moment the impact that this proposal would have on a small business not unlike the many among our membership. I have a direct example in mind.

The business consists of a company's founder-president, four clerical employees and 35 production employees in the back shop. A significant source of its orders and profits are derived from a contract with the Defense Department. This small company is so small that the president must from time to time pitch in with the production employees when the need arises. This president happens to be on our board of directors at NAM.

Should the president of this company travel to Washington once during the course of a year to attend a NAM policy committee meeting or perhaps to meet with his Congressman, his entire salary for the year must be excluded from his company's overhead for the purposes of the Government contracts; not only that, but the salary of his secretary also must be eliminated.

In his case he takes up one-third of the office space and the four ladies take up the other two-thirds. It would mean his office space could not be charged to the Government contract because it exceeded the limits of the "5-percent rule" in the OMB circular.

This same effect would be accomplished if he contacted his local governmental authorities in an attempt to obtain a new traffic light outside of his plant.

Of course, since this person would, under this proposal, be defined as a political advocate, the entire cost of his building and certain items of equipment must also be excluded if their percentage occupancy is more than 5 percent of the usable space contained therein.

The only way to avoid this disallowance under the 5-percent rule is to move this political advocate and his attendant equipment out of the building entirely.

We must confess that we fail to see the reasonableness or equity of such a result on this small businessman.

Mr. Chairman, this example merely scratches the surface of the difficulties inherent in this proposal. In operation, this proposal will generate significant cost increases to the Government, to the consuming public and, of course, to those directly affected.

Companies that have access to sophisticated accountants and lawyers may be able with great difficulty and expense to create a zone of quarantine that will separate a company's political advocacy from its other operations. These costs will also be borne directly by the taxpayer and the consumers.

Other companies less capable of dealing with this situation will simply have to choose either to forego any level of participation in the governmental process or any Government contract work.

To the extent that the former occurs we all lose. To the extent that the latter occurs, then the Government again loses through reduced competition, lost jobs and other undesirable economic side effects.

As unintentional as these results may be, they are clearly foreseeable.

We do not have any specific remedial language to suggest to the OMB at this time, but we do believe that there are ways to accom-

plish its objective by less onerous and less constitutionally suspect means.

A government dedicated to a strong economy and the proposition that an informed and politically active citizenry is the best guarantor of freedom should go forward with regulations of this type only after a careful weighing of the costs and the benefits of the change.

OMB has yet to clearly identify the need for its proposed changes and no attempt has been made to quantify the putative benefits that will be derived from them.

This must occur before we should tumble headlong into an uncharted area that is fraught with so many practical difficulties.

Thank you, Mr. Chairman. Mr. Lipkin and I are available to answer any questions the subcommittee may have.

[Mr. Rettgers' prepared statement follows:]

STATEMENT OF
FORREST I. RETTGERS, EXECUTIVE VICE PRESIDENT
OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS

Good morning, Mr. Chairman. My name is Forrest I. Rettgers and I am the Executive Vice President of the National Association of Manufacturers (NAM). With me today is Gary D. Lipkin, Assistant General Counsel of the NAM. We are most appreciative of the opportunity to appear here today to express the concerns of our membership on the recently proposed revision to OMB Circular A-122. While Circular A-122 applies only to non-profit organizations, the Department of Defense, General Services Administration and the National Aeronautics and Space Administration have simultaneously proposed identical revisions to their procurement rules for their "for profit" contractors. For the sake of convenience, however, we refer herein solely to the OMB proposal.

NAM is a non-profit, voluntary business association consisting of over 12,500 member firms of all sizes from all parts of the country. NAM members employ about 85 percent of all employees engaged in manufacturing nationwide, and they account for about 80 percent of our nation's industrial output. Further, approximately 78 percent of our members are entities that are generally considered to be "small business." An additional 158,000 employers are represented by other associations that are affiliated with the NAM through its Associations Department and the National Industrial Council.

Mr. Chairman, let me make clear at the outset that the NAM is not a government contractor and we do not solicit or accept federal grants. However, OMB's proposed revisions to Circular A-122 will have an indirect effect on NAM as an entity, and a very substantial and deleterious impact on a vast segment of our membership. So very broad and unrestrained is OMB's proposal that it literally toys with fundamental and cherished constitutional rights. So too it has generated a furor in Washington and around the country the likes of which I have only rarely seen in my many years as an active participant in our governmental process. Without question, OMB's proposal deserves and requires the closest scrutiny.

The NAM and other trade associations have spent a great deal of time and effort in the last few years encouraging our members to develop active public affairs programs. We have done so largely because of our strong belief that business entities have First Amendment rights not unlike those afforded individuals; and that the responsibilities that these rights entail, plus principles of good citizenship and simple common sense, require that these rights be fully exercised and vigorously defended when threatened. We feel that OMB's proposed revisions to Circular A-122 do indeed represent a threat to those constitutionally guaranteed freedoms.

We are not at all unsympathetic to the objective sought to be achieved by the OMB in its proposal: preventing federal funds from being used for improper political advocacy. As a general

proposition, taxpayer dollars should not be used to directly fund overt partisan activities or lobbying as those terms are traditionally defined and understood. Nor do we contend that there have not been past instances of abuse in this area. But OMB's proposed "cure", when viewed in its totality, may well prove to be far worse than the suggested "disease." Our primary concern is that in attempting to reach the legitimate goal of avoiding the diversion of government funds to political advocacy, the government not infringe in an unnecessary, overly burdensome, or unconstitutional manner upon the free exercise of treasured constitutional rights.

The proposed revision simply goes too far in its attempt to cure a "problem" that, if it does exist, certainly does not call for so draconian a solution. For instance, the definition of the term "political advocacy" goes far beyond any other definition of similar terms like "lobbying" or "partisan activity." The expanded definition urged on us by the OMB includes activities that are "political" if at all, in only the most peripheral sense. Such things as amicus briefs, dues to a trade association, the costs associated with a meeting that has any portion, no matter how small, devoted to things political, and items of equipment (e.g., a photocopier, a telephone) used in any part for political advocacy would be unallowable costs under this proposal because they have

all been defined by the OMB as new-found types or instrumentalities of political advocacy.

Mr. Chairman, permit me to give you a few real life illustrations as to how some of these changes would directly affect certain of our members. As a member-led organization, our policies on issues are debated and established through a system of policy committees that are composed of representatives of our member companies. They are often convened in Washington for discussions of public policy issues and perhaps then they may meet with elected or other government representatives. The activities just described would both fall under OMB's new definition of political advocacy.

In a particular situation that I have in mind, our member company consists of the founder-president, four clerical workers, and thirty-five other employees who make a product for the Department of Defense under a contract that provides the vast bulk of this company's work orders and profits for the year. By any measure, this is a small business - so small, in fact, that the founder-president often takes the place of an absent employee on the shop floor. Yet, this individual's sole "political advocacy" for the year might well be this trip to Washington. Is it fair or reasonable to disallow his entire annual salary from his company's overhead under the contract because of this one trip? Is it equitable to force him to remove himself, his photocopier, his telephone, etc., to another building if he, as his company's

"political advocate" is found to occupy more than 5 percent of the useable space in his current quarters?

The NAM, for one, emphatically does not believe that such a result is fair or equitable. Nor, with 78 percent of our members being small businesses, would this result represent an isolated incident. Yet, such would be the direct impact of the proposed revision to Circular A-122. I would suggest that the upshot of this could well be the cessation of this individual's and other similarly situated individuals' involvement in the political system and the NAM. The absence of the input of concerned citizens like this is a development that this country can ill-afford and this government should not foster.

Encouraging greater citizen involvement in the political process is an oft-stated goal of our system. Indeed, prominent figures often bemoan the lack of such involvement. While this is not the time or the place to debate the merits of political action committees (PACs), few can deny that their existence has brought many new faces and players into an active role in the political process. In enacting the Federal Election Campaign Act (FECA) and approving the regulations promulgated thereunder, Congress recognized that there is a very real difference between the funds given to a PAC for contribution purposes and those used for its operation and administration: while Congress forbade direct corporate donations to a PAC's treasury for the purpose of making

contributions to candidates, it specifically permitted corporations to use their general treasury funds to underwrite a PAC's administrative and operational costs. Clearly, the goal of keeping corporate money out of the coffers of political campaigns was not compromised, in the judgment of Congress, by allowing corporations to use their money to pay for the operation and administration of their PACs.

Apparently, the OMB has come to a contrary conclusion as it has chosen to include these costs in its list of items that constitute "political advocacy" and cannot be paid for by funds derived from government contracts. I emphasize that the money I am referring to here does not find its way into a campaign treasury; rather, it is used by the corporation to operate and administer a means by which its employees - ordinary citizens - can make their presence felt in the political system. Again, the OMB proposal could have the unintended side effect of limiting this source of citizen input into the political process.

I believe it should be abundantly clear by now that the definition of "political advocacy" adopted by the OMB here is far too broad. The accepted definition, much akin to what is commonly considered to be "lobbying," has stood the tests of time and our judicial system. It has not been shown to be inadequate. We therefore respectfully suggest that the current definition is satisfactory and that this new and expanded definition is

unnecessary. Further, if a new definition is required for some reason, it should be developed in a more rational and studied manner than that which has been attempted here.

Intertwined with, and exacerbated by, the overbroad definition of the term "political advocacy," are the sweep and potential consequences of the list of "unallowable costs" that the proposal contains. Permit me to return to my illustration of the small business executive that I referred to earlier. As a company official, it would be within the ordinary course of business for him to engage in a certain amount of so-called "political" activities at the local and state, as well as the federal level. Often the very well being of a small business and its employees may depend on some involvement in government at levels other than national, and this proposal would cover such activities at all levels of government. It seems patently unfair and alien to our system to disallow all of this executive's salary costs if he engages in nothing more than, for example, attempts to persuade the local county board of supervisors to approve the installation of a traffic light at the main gate of his plant. Yet, I would suggest that such a ludicrous result is compelled by the existing language of the OMB proposal.

The wording of the proposal indicates other, equally incongruous results. The costs associated with a corporate telephone line used for hundreds, even thousands, of purely

business-related calls over the course of a year will be completely disallowed if but one call is made on a political topic. A photocopier used to make tens of thousands of copies of various corporate documents will be disallowed if so much as a single copy is made of a document urging political action of some sort. A corporate computer, used to keep records and payroll accounts will be disallowed if it is programmed to deduct a portion of an employee's pay check for a contribution to the company's political action committee, even though this use takes up but a fraction of the time - a literal microsecond - that the computer is in operation. The costs associated with a meeting of corporate employees or shareholders would be disallowed if so much as a single statement urging those in attendance to "vote in the next election" was made. This list, Mr. Chairman, goes on and on ad infinitum. I would strongly suggest that this Committee urge the OMB to give some careful and deliberate thought to the breadth of their list of unallowable costs in view of these easily foreseen, and perhaps unintended, consequences. It is our belief that, operated in tandem, the scope and inherent vagueness of the terms "political advocacy" and "unallowable costs" can easily become a giant pincers for the stifling of the free and unfettered exercise of First Amendment rights.

While the practical impact of this proposal on political advocacy programs is substantial, a more basic concern is that of

its effect on the fundamental First Amendment rights of free speech and political association. Mr. Chairman, the NAM has reviewed the Supreme Court cases cited by the OMB in the Summary and Appendix portions of its Federal Register notice announcing this revision at 48 Fed. Reg 3348-3351 (January 24, 1983), and, frankly, we do not agree that these cases answer, or are responsive to, the difficult and pressing constitutional problems raised by this proposal.

The OMB proposal deals with the "problem of the use of federal funds for political advocacy . . .". In contrast, the cases cited by the OMB deal with varying forms of government-sanctioned coercion of individuals to subscribe, or contribute, to a particular political ideology or cause on pain of losing some sort of government conferred benefit:

Aboud v. Detroit Board of Education, 431 U.S. 209 (1977), held that the government may not, without seriously inhibiting the free exercise of First Amendment rights, force public school teachers to relinquish their right to freely choose the political causes with which they wish to associate or contribute to as the price of holding their jobs;

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), held that a public school student could not, on pain of expulsion, be forced to salute the flag;

Wooley v. Maynard, 430 U.S. 705 (1977), held that a state could not compel its citizens to display the state motto on their automobile license plates on pain of imprisonment when to do so would violate the citizens' religious beliefs; and,

Elrod v. Burns, 427 U.S. 347 (1976), a case involving patronage dismissals, held that the government could not force a public employee in a non-political job to give up his right to certain political associations and beliefs as the price of holding his job without seriously inhibiting the exercise of First Amendment rights. The plurality opinion further notes that the loss, or threat of loss, of "First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.*, at 373, citing New York Times Co. v. United States, 403 U.S. 713 (1971).

The OMB would have done well to consider other cases which are perhaps more relevant to the constitutionality of the proposal at issue here. For instance, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972), New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), and NAACP v. Button, 371 U.S. 415 (1963), all make clear that many of the types of political advocacy that are at issue here are protected by the First Amendment. It is a well-settled axiom of constitutional law that if such rights are to be circumscribed, it must be done in a manner

that does so to the minimum extent possible. We suggest that this principle has been all but ignored here.

Other rulings of the Supreme Court make clear that "even though a person has no right to a valuable government benefit," such as a government contract or grant, "and, even though the government may deny him the benefit for any number of reasons," the government, "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593 (1972) (emphasis supplied); accord, McDaniel v. Paty, 435 U.S. 618 (1978). This is true "however slight the inducement to the individual to forsake these rights." Elrod, at 358 n. 11 (1976) (plurality opinion).

It is well-settled that government action which "chills," even if it does not expressly prohibit, the exercise of an individual's First Amendment rights is unconstitutional; the principle here is that the government may not put so high a price on the exercise of a constitutional right that few will choose, or have the ability, to so do. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Dombrowski v. Pfister, 380 U.S. 479 (1965). Supreme Court decisions have consistently held that legislative restrictions on political advocacy are "wholly at odds with the guarantees of the First Amendment." Buckley v. Valeo, 424 U.S. 1,

50 (1976), citing Mills v. Alabama, 384 U.S. 214 (1966), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). A law which restricts speech or association on the basis of its content, as in advocating a political point of view, must be closely and carefully scrutinized to determine whether it impermissibly "chills" an individual's First Amendment rights. In Buckley, for example, the Supreme Court held that the primary effect of certain campaign independent expenditure limitations was the restriction of the quantity of political speech and that "[these] restrictions, while neutral as to the items expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" Buckley at 39, citing Williams v. Rhodes, 393 U.S. 23, 32 (1968).

Mr. Chairman, we have not had the opportunity to conduct an extensive and/or exhaustive review of all of the constitutional ramifications of the revision proposed by the OMB. We do believe, however, that the cases cited above indicate the potential dimensions of the constitutional problems inherent in this proposal. We suggest that these cases can lead to the conclusion that, at the very least, more thoughtful consideration must be given to the possibility that the free exercise of First Amendment rights will be seriously compromised by the operation of the proposed revision to Circular A-122. Covered entities may well be forced to choose between accepting federal contracts and freely

exercising their constitutional rights. Such a result must not be taken lightly and demands close and careful scrutiny.

The OMB has itself recognized the potential constitutional dimensions of this proposal and has taken great pains to characterize its effort as one that will "enhance" First Amendment freedoms. I submit that by increasing the costs and difficulties of engaging in First Amendment activities so greatly, and thereby increasing the likelihood that some entities will not choose to exercise them, the OMB has done exactly the opposite. These freedoms must be vigorously protected, "not only against heavy-handed frontal attack but also from being stifled by more subtle government interference." Bates v. Little Rock, 361 U.S. 516 (1960). As the Supreme Court has further stated:

In the domain of the indispensable liberties of speech, press, or association, abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (emphasis supplied).

Again turning to the potential effects of this forced election in the business world, let me make the following observations. Complying with this proposal as it now stands, and continuing a meaningful and effective political advocacy program will be quite costly and cumbersome. If a business entity wishes to continue

its so-called advocacy activities as defined by the OMB, it will be forced to take certain steps to assure that such advocacy does not "infect" or "taint" the equipment and facilities used in the fulfillment of its contractual obligations to the government so as to prevent them from being included as costs under the government contract. The best way to do this would probably be by purchasing separate equipment that will be used solely for political advocacy purposes. The additional costs that this would impose will most assuredly be passed on in some fashion to the consumer-taxpayer that the OMB claims it is trying to protect here.

This proposal is not cost free to the government either. If the government contractor chooses to continue its political advocacy and its government contracting business, it may well choose to purchase or devote certain equipment solely to the fulfillment of its government business. Since the Circular, as revised, will prevent these items from being charged to anything other than government business, the price of the goods furnished will rise, thereby increasing the cost of the contract to the government. Again, the taxpayer will pay the ultimate price. At a time when every effort is being made to cut or otherwise control government expenditures, it seems somewhat self-defeating to propose a change in procurement rules that will, at the very least, serve as a means of increasing these very expenditures.

It may well be that some of the larger government contractors covered by this proposal will be able to "finesse" their way around it through complicated and unique accounting procedures, or by creating a completely sterile cocoon within which all of their political advocacy activities would be concentrated. But this sort of effort at compliance also will carry a stiff price, and we seriously question whether these added costs will be worth putative benefits that have yet to be precisely identified or quantified in any meaningful way. These added costs will be paid, initially, by the contractor and the government, and eventually, by the taxpayer.

In addition, there may well be certain contractors, especially the smaller ones, who may simply decide to forego government contract work entirely. This too can lead to higher prices due to reduced competition, and can have other less than desirable economic side-effects including reduced employment opportunities. Far from setting up a "wall of separation" between government money and political advocacy, this revision will create a "zone of quarantine" around government contracts into which entry will be costly and limited to only the few who are willing to pay those costs and risk a federal inquiry into their entire public affairs function.

A hard choice is thus presented to a potential federal contractor. The exercise of a fundamental constitutional right - political advocacy or petitioning the government for a redress of

grievances - may have to be circumscribed or surrendered in order to freely bid on government contracts. The alternative, foregoing all government contract work, should not be encouraged by the government in this or any other fashion. The end result here is the well-known "chilling effect" on the exercise of treasured freedoms. We would urge that the OMB give some consideration to such important consequences.

While we do not have any specific remedial language to suggest at this time, the NAM believes that there are ways to reach the OMB's stated objective by less onerous and constitutionally suspect means. However, since any regulation in this area potentially impinges on fundamental rights, careful and deliberate scrutiny will be required. In any event, nothing should be done unless and until the views of constitutional scholars, affected organizations, other interested parties, and the Justice Department are made known. The broad and vague definition of political advocacy and the resulting extensive list of unallowable costs are serious, and in our view, potentially fatal flaws in this proposal. More importantly, a government dedicated to a strong economy and the proposition that an informed and politically active citizenry is the best guarantor of freedom should go forward with regulations of this type only after thorough analysis and careful thought.

When Congress, the regulatory agencies, and the courts have acted in the analogous areas of lobbying regulation, ethics in

government statutes, and federal election laws, they have done so in response to a definite, well publicized, and amply documented need after extensive public debate and comment. In all of these instances, clear and convincing evidence that the then-existing rules were inadequate was presented. None of these steps have been taken here. We respectfully suggest that something more than a bald assertion, with no evidence or documentation presented, that "the problem of the use of federal funds for political advocacy by grantees and contractors has been identified . . ." is needed before so drastic a change with such serious ramifications is proposed and adopted. This is especially the case when the potential for the infringement of basic constitutional rights is so much in evidence.

Mr. BROOKS. Thank you very much for a fine statement; definitive and useful.

I might ask you just one question. The OMB circular would prohibit contractors and grantees from contributing money, including dues, to any organization that had political advocacy as a substantial organizational purpose or that spent \$100,000 or more per year on political advocacy.

Would this provision disqualify many of your members from belonging to your association?

Mr. RETTGERS. It certainly would, Mr. Chairman. As you know, NAM spends a great deal of its time on political advocacy. We represent our members for just that purpose here in Washington. I guess we could say that it would inhibit us. As I told Mr. Horowitz, if he was wrong at the end of the year he could say he was sorry; at the end of that same year, if I were wrong, I would be out of business.

Mr. BROOKS. I appreciate your comments.

Mr. Horton?

Mr. HORTON. Mr. Rettgers, your testimony is very important.

Mr. RETTGERS. Always happy to see you, Mr. Horton. You have been a friend of business for years and years along with the chairman.

Mr. HORTON. Thank you very much.

I think your testimony will help us to correct this problem that OMB has created. You have been here all morning so you have heard the efforts of the chairman and me to make certain that they understand downtown that we do not want this kind of regulation.

Mr. RETTGERS. If OMB had been there one-third of that time they would know there is no way it will go away.

Mr. HORTON. Thank you.

Mr. BROOKS. Thank you very much.

Our next witness is George A. Daoust, Jr., executive director of the National Council of Technical Service Industries. His organization represents two dozen of the largest defense contractors, including Boeing, Northrup, and Lockheed.

Prior to joining NCTSI he worked for Planning Research Corp. and Stanford Research Institute. Dr. Daoust has also served as Deputy Secretary of Defense for Manpower Research and Utilization.

Dr. Daoust is a graduate of the U.S. Military Academy and received his Ph. D. in international relations from Georgetown University. He is married to a lovely lady named Lucy.

Doctor, we are delighted to have you. Proceed with your remarks.

STATEMENT OF GEORGE A. DAOUST, JR., EXECUTIVE DIRECTOR, NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES

Mr. DAOUST. It is a great pleasure to be here. Thank you.

I request that my statement be included in the record in toto, please.

Mr. BROOKS. Without objection, it is so ordered.
The gentleman is recognized.

Mr. DAOUST. I certainly appreciate the opportunity to speak on this issue. As you mentioned, sir, we are 23 companies providing technical services under contract to the Federal Government. That is a common factor that pulls them together into the council.

I only thought I was concerned about this issue before I read the testimony that Mr. Wright inserted into the record this morning. If after all this reaction they still hang on to the framework of this revision we are indeed in serious trouble.

This broad net of the revised Circular A-122 covers a lot of technical issues. For instance, fixed price versus cost plus fee contracts; theoretically this would only apply on a cost plus fee contract.

On a fixed price you should be able to go in, you contract to do so much work for a certain amount of money. But in actual practice the Defense auditors may well look at your fee structure or overhead structure for awarding that fixed price contract.

So it is a lot broader than it would appear.

At the same time it is discriminatory in that it applies only to those particular types of contracts.

Almost everything in this revision is pointed toward something that isn't broke. The whole excuse seems to be that the Government is not able to enforce laws and regulations on lobbying and such activities.

To issue such a blanket regulation to try to correct something that they can't fix already is very wrong.

The idea of contamination that is in here, that one action will contaminate the overhead costs of the individual, or the facility or the transportation for a year. Why a year? Why not an hour for an hour or a week or a month or 2 years?

It is absolutely arbitrary and it is punitive. This is the major problem, I believe.

Rather than disallowing the particular activities, and this is mixed up later again in Mr. Wright's statement where he starts getting confused over the fact that what we are talking about here is not disallowing the funding, not having the Government pay for something, but having the Government not pay for anything that the individual does or the piece of equipment is used for.

This punitive aspect is even worse than most of the other terms.

It is very unbalanced. The discussion this morning talked about it being balanced, applying to everybody. They don't apply to unions.

I am not recommending that. I don't want it to apply to anyone. But they are exempt.

There is a term used frequently by Members of both parties, "gigob," "get into politics or get out of business."

OMB is reversing that. They are saying, "If you are in politics you are going to be out of business with the Federal Government."

The accounting system changes that would be required under this version or what appears to be the new revised version coming out are going to be very expensive, complex; they will probably be unworkable and may well be unallowable by the Government auditors, because when you start setting up a couple of different overhead accounting systems, trying to separate these things, you run into a lot of other regulations.

Trade associations don't fare well under the revised regulations. It says in here quite clearly Mr. Wright intends that trade associations will still be proscribed in the same terms.

A wide range of companies belong to trade associations. It is one way small companies and small segments of society can be represented with a fairly loud voice. To ban them this way, to preclude them from contributing to associations because they have a grant or contract from the Government is very discriminatory.

Our broad political and economic actions which form our society would be closed to all companies and associations that are covered by this circular. This broad political-economic system that we work in requires the input from a lot of people that do not have a Washington representative and are going to keep you from having to read letters from every one of your constituents who has a problem.

The complexity of the various laws, IRS regulations, Federal Election Commission rules, acquisition regulations, are pretty bad.

The role of Government-sponsored councils, advisory groups, testifying like this, all these ancillary actions are fairly complex.

The political situation, many States allow direct contributions from corporations to political funds. This is a complex area. To try to establish one overall blanket and say this is how we are going to cover all of this, we aren't going to worry about the details, we are going to issue a rule that will cover everything and take care of it, is overly simplistic and unworkable.

The enforcement of the lobbying laws, compliance of the permanent regulations that we have now, needs another approach.

The fact that the Government can't enforce them is not reason to layer another set of regulations on top of what we already have.

As several members of this subcommittee and witnesses recommended, this revision should be withdrawn entirely and start over with a new concept: What are the objectives? What is being sought? What do they want to do? Start from that in a systematic fashion and try to get there.

Mr. Wright says in his testimony there is no uniform comprehensive policy on costs for political advocacy. I hope there never will be.

If you can roll everything that falls within that mantle into one clear brief statement, albeit doing it in 2 weeks, it is going to take more genius than was demonstrated in the initial revision.

Thank you.

[Mr. Daoust's prepared statement follows:]

STATEMENT OF
GEORGE A. DAoust JR.
EXECUTIVE DIRECTOR
NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY ON THE PROPOSED REVISION TO OFFICE OF MANAGEMENT AND BUDGET (OMB) CIRCULAR A-122.

AS IS STATED IN THIS REVISION, SIMILAR PROVISIONS HAVE BEEN PROPOSED FOR CIVILIAN AND DEFENSE CONTRACTORS THROUGH LETTERS FROM THE DEPARTMENT OF DEFENSE, THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION AND THE GENERAL SERVICES ADMINISTRATION. THESE AGENCY ACTIONS, WHICH ARE IDENTICAL TO THOSE INCLUDED IN THE OMB REVISION, ARE THE REGULATIONS WHICH ARE OF CONCERN TO INDUSTRY.

I AM THE EXECUTIVE DIRECTOR OF THE NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES (NCTSI), WHICH IS AN ASSOCIATION OF 23 COMPANIES WHICH PROVIDE TECHNICAL SERVICES TO THE FEDERAL GOVERNMENT (MEMBERSHIP LIST ATTACHED). THESE TECHNICAL SERVICES ARE COMMERCIAL AND INDUSTRIAL TYPE ACTIVITIES WHICH ARE PERFORMED UNDER CONTRACT TO THE GOVERNMENT. ESSENTIALLY THESE CONTRACTS ARE OF TWO TYPES: EITHER AT A FIXED PRICE OR ON A COST PLUS FEE ARRANGEMENT.

THE PROVISIONS OF REVISED OMB CIRCULAR A-122 APPLY ONLY TO GOVERNMENT CONTRACTS OF THE COST PLUS FEE TYPE. THUS, A COMPANY PERFORMING ESSENTIALLY IDENTICAL WORK FOR A PRIVATE SECTOR CLIENT, A GOVERNMENT CLIENT ON A FIXED PRICE CONTRACT AND A GOVERNMENT COST PLUS FEE CONTRACT WOULD HAVE TO ESTABLISH A SEPARATE ACCOUNTING SYSTEM FOR THE THIRD TYPE OF CONTRACT IN ACCORDANCE WITH THIS CIRCULAR. THIS IS THE FIRST PROBLEM WITH THIS CIRCULAR, IT IS DISCRIMINATORY IN ITS APPLICATION.

I WOULD LIKE TO POINT OUT THAT WHILE I AM ENDEAVORING TO BE AS PRECISE AS POSSIBLE, THIS IS SUCH A TECHNICALLY COMPLICATED SUBJECT THAT ANY STATEMENT IS SUBJECT TO MODIFICATION AND/OR EXCEPTIONS. FOR EXAMPLE, WHILE UNDER A FIXED PRICE CONTRACT THE CONTRACTOR THEORETICALLY BIDS TO PROVIDE A CERTAIN PRODUCT OR SERVICE FOR A CERTAIN AMOUNT OF MONEY, IN PRACTICE THE GOVERNMENT CONTRACTING PEOPLE MAY EXAMINE HIS OVERHEAD RATE AND OTHER COMPONENTS OF HIS PRICE PRIOR TO AWARDING THE CONTRACT. IN THIS CASE NON-COMPLIANCE WITH OMB CIRCULAR A-122 COULD INFLUENCE THE AWARD OF A FIXED PRICE CONTRACT.

THERE ARE EXTENSIVE LAWS AND REGULATIONS WHICH CONTROL POLITICAL ADVOCACY, LOBBYING, LEGAL COSTS, LEGISLATIVE LIAISON AND THE OPERATION OF POLITICAL ACTION COMMITTEES, (PAC'S) TO MENTION ONLY A FEW OF THE ACTIVITIES THIS PROPOSED CIRCULAR ADDRESSES. FROM THE VIEWPOINT OF INDUSTRY THIS CIRCULAR ISOLATES COSTS PLUS FEE CONTRACTS AND REQUIRES ENTIRELY DIFFERENT ACCOUNTING PRACTICES FOR THE TYPES OF ACTIVITIES I JUST MENTIONED, WHICH ARE LUMPED TOGETHER AS "POLITICAL ADVOCACY". OVERHEAD COSTS, WHICH MUST BE IDENTIFIED IN A COST PLUS FEE CONTRACT, ARE THE RATIONALE USED UNDER THIS CIRCULAR TO PRECLUDE THE OTHERWISE IMPARTIAL APPLICATION OF LAWS AND REGULATIONS RELATING TO POLITICAL ADVOCACY TO A GOVERNMENT CONTRACTOR.

THIS IS THE NEXT PROBLEM WITH THE PROPOSED CIRCULAR, IT IS ATTEMPTING TO PREVENT ACTIVITIES WHICH IN MOST CASES ARE ALREADY UNALLOWABLE OR EVEN ILLEGAL UNDER EXISTING LAWS AND REGULATIONS. THE FAILURE OF THE GOVERNMENT TO ADEQUATELY ENFORCE CURRENT LAWS AND REGULATIONS IS A POOR REASON FOR A SWEEPING DISCRIMINATORY PROHIBITION ON POLITICAL ACTIVITY AS IS PROPOSED IN THIS CIRCULAR.

LOBBYING COSTS ARE NOT NOW ALLOWABLE ON GOVERNMENT CONTRACTS, INCLUDING FEES TO INDIVIDUALS OR FIRMS ENGAGED IN LOBBYING.

CORPORATE CONTRIBUTIONS TO PAC'S ARE NOT ALLOWED BY THE FEDERAL ELECTION COMMISSION, ALTHOUGH ADMINISTRATIVE COSTS OF SUCH COMMITTEES CAN BE FUNDED BY THE COMPANY. THIS OMB REVISED CIRCULAR DENIES COMPANIES AND INDIVIDUALS WORKING ON GOVERNMENT COST PLUS FEE CONTRACTS THE POLITICAL FREEDOM AUTHORIZED BY THE FEDERAL ELECTION COMMISSION. THIS IS ANOTHER PROBLEM WITH THIS PROPOSED CIRCULAR, IT APPEARS TO BE CHANGING LEGAL RIGHTS WITHOUT BENEFIT OF LEGISLATION.

THE CONCEPT OF CONTAMINATION BY POLITICAL ADVOCACY IS NOT SPELLED OUT AS CLEARLY IN THE NOTICE PRINTED IN THE FEDERAL REGISTER ON CIRCULAR A-122 AS IT HAS BEEN EXPLAINED IN THE MANY MEETINGS WITH OMB PERSONNEL. HOWEVER, IT APPEARS CLEAR THAT OMB INTENDS THAT ONE ACT OF POLITICAL ADVOCACY WOULD PRECLUDE AN INDIVIDUAL FROM BEING CHARGED TO OVERHEAD ON A GOVERNMENT CONTRACT FOR A YEAR. THE OTHER CONTAMINATION CONCEPTS EXPAND THE DISALLOWAL OF CHARGES FOR EQUIPMENT, TRANSPORTATION, SPACE ETC. THROUGH ANOTHER CRITERIA UNDER WHICH, WHEN 5% OF A FACILITY HAS BEEN CONTAMINATED THE ENTIRE FACILITY IS DISALLOWED.

I WOULD LIKE TO MAKE IT CLEAR THAT THIS DISALLOWANCE OF COSTS IS PUNITIVE, IN THAT ALL COSTS FOR THE ARBITRARY PERIOD OF ONE YEAR CANNOT BE CHARGED AS THE RESULT OF ONE ACTION WHICH CAN BE AS HARMLESS AS RECOMMENDING A BALANCED BUDGET TO YOUR CONGRESSMAN. LOBBYING IS NOT NOW AN ALLOWABLE OVERHEAD CHARGE. IF A PERSON WORKING FOR A GOVERNMENT CONTRACTOR IS ENGAGED IN LOBBYING UNDER CURRENT REGULATIONS, NO PORTION OF THE TIME SO SPENT, TRANSPORTATION,

COMMUNICATIONS OR OTHER EXPENSES INVOLVED CAN BE CHARGED TO OVERHEAD.

HOWEVER, UNDER THE PROPOSED CIRCULAR ALL OVERHEAD CHARGES FOR EVERY INDIVIDUAL WOULD BE DISALLOWED FOR ONE YEAR! HOW OR WHY AN ARBITRARY ONE YEAR PENALTY WAS SELECTED, RATHER THAN A WEEK, MONTH, TWO YEARS OR ANY OTHER TIME HAS NOT BEEN EXPLAINED. THE CLEAR INTENT TO PENALIZE ANY POLITICAL ADVOCACY, RATHER THAN SIMPLY NOT HAVE IT CHARGED TO A GOVERNMENT CONTRACT, IS UNDERSTANDABLY THE MAJOR FAULT WITH THIS PROPOSAL REVISION. THE INTENT SEEMS TO BE TO DRIVE INDUSTRY COMPLETELY OUT OF POLITICS. BY THIS, I MEAN INDUSTRY AS AN ENTITY.

THIS WOULD UNBALANCE THE POLITICAL EQUATION. IT SHOULD BE NOTED THAT THIS PROPOSED CIRCULAR EXEMPTS LABOR UNIONS SO THAT THEIR POLITICAL ACTIVITIES WOULD BE UNCHANGED. FULL PARTICIPATION IN A POLITICAL ACTION COMMITTEE WOULD DISALLOW ALL OVERHEAD COSTS FOR A COMPANY WITH COST PLUS FEE CONTRACTS. WHILE THE PUBLISHED NOTICE STATES THAT FIRMS CAN ENGAGE IN POLITICAL ADVOCACY AND STILL RECEIVE GOVERNMENT CONTRACTS, IT ESSENTIALLY REQUIRES THAT THEY HAVE EMPLOYEES AND FACILITIES FOR ANY POLITICAL ADVOCACY WHICH ARE SEPARATE FROM THOSE WORKING ON THE CONTRACT. SO, IF YOU WORK ON A GOVERNMENT CONTRACT, YOU CANNOT PARTICIPATE IN YOUR COMPANY PAC AND HAVE YOUR OVERHEAD CHARGES ALLOWED.

SEVERAL SENATORS AND REPRESENTATIVES HAVE USED THE PHRASE GIPOGOOB WHEN ADDRESSING INDUSTRIAL GROUPS. THIS STANDS FOR "GET INTO POLITICS OR GET OUT OF BUSINESS". IT SEEMS THAT OMB NOW INTENDS TO REVERSE THIS CONCEPT, AND EXCLUDE BUSINESS FROM POLITICS.

ANOTHER MAJOR PROBLEM IS CREATED BY THE NEED FOR A NEW ACCOUNTING SYSTEM TO IDENTIFY ALL OF THE PEOPLE, EQUIPMENT AND SPACE INVOLVED IN POLITICAL ADVOCACY; AND THEN COMPUTE THE PERCENTAGES OF CONTAMINATED SPACE SO AS TO ASCERTAIN WHENEVER 5% IS EXCEEDED. NO LONGER WILL A TIME CARD SUFFICE; A SINGLE PHONE CALL AFTER WORKING HOURS COULD ELIMINATE AN INDIVIDUAL, HIS OFFICE AND PERHAPS THE ENTIRE BUILDING FROM OVERHEAD COSTS FOR A YEAR. THIS IS AN EXTREME EXAMPLE, BUT CIRCULAR A-122 CALLS FOR EXTREME ACTIONS.

IT IS ALWAYS EASY TO SAY THAT A PARTICULAR LAW, REGULATION OR PROGRAM WILL HAVE DRASTIC RESULTS; THAT IT IN EFFECT WILL BE THE STRAW THAT BREAKS THE CAMELS BACK. WHILE OMB CIRCULAR A-122 MAY OR MAY NOT SO QUALIFY ON GENERAL GROUNDS, IN ONE ASPECT IT SEEMS TO BE POTENTIALLY QUITE DESTRUCTIVE. SINCE THIS CIRCULAR ESSENTIALLY APPLIES ONLY TO COST PLUS FEE CONTRACTS TO THE GOVERNMENT, ANY COMPANY DOING A SMALL PERCENTAGE OF SUCH WORK OR A COMPANY WHICH CONSIDERS ITS GOVERNMENT WORK TO BE OF MARGINAL PROFITABILITY MAY DECIDE TO DROP SUCH WORK BECAUSE OF THE ACCOUNTING PROBLEMS. CERTAINLY ESTABLISHING A SEPARATE NON-POLITICAL ORGANIZATION WHICH CANNOT PARTICIPATE IN THE CORPORATE OVERHEAD IS A MAJOR PROBLEM. A SEPARATE ACCOUNTING SYSTEM AND OVERHEAD RATE FOR GOVERNMENT COST PLUS FEE CONTRACTS WILL BE EXPENSIVE AND MAY BE DISALLOWED BY GOVERNMENT AUDITORS.

THERE IS ALSO THE PROBLEM OF MEMBERSHIP IN TRADE ASSOCIATIONS, SUCH AS NCTSI. WE WERE TOLD THAT TRADE ASSOCIATION DUES WOULD NOT BE ALLOWABLE AND THAT IF TRADE ASSOCIATIONS WERE NOT INVOLVED IN POLITICAL ADVOCACY NO ONE SHOULD JOIN THEM ANYWAY. ASIDE FROM

DIRECT LOBBYING, WHICH IS ALREADY STRICTLY CONTROLLED UNDER FEDERAL ELECTION COMMISSION AND TAX-EXEMPT LEGISLATION, MOST ASSOCIATIONS PROVIDE A FORUM AND CONSENSUS UNDER WHICH THE VIEWS OF THEIR MEMBERS ARE MADE KNOWN TO THE EXECUTIVE AGENCIES. THERE ARE A VAST NUMBER OF RULES AND REGULATIONS, SUCH AS THIS REVISION OF CIRCULAR A-122 WHICH REQUEST INDUSTRIES COMMENTS. ASSOCIATIONS HELP TRANSMIT THE REQUEST TO INTERESTED COMPANIES AND DEVELOP A RELATIVE CONSENSUS IN RESPONSE. ASSOCIATIONS ALSO FREQUENTLY PARTICIPATE IN MEMBERSHIP ON PANELS, ADVISORY COUNCILS AND COUNTLESS OTHER POLITICAL/ECONOMIC ACTIVITIES WHICH HELP SHAPE OUR SOCIETY. FOR THE SMALL COMPANY EVEN MORE THAN THE LARGE ONES, ASSOCIATIONS PERMIT PARTICIPATION IN THE BROAD RANGE OF POLITICAL/ECONOMIC ACTIVITIES WHICH DECIDE HOW OUR COUNTRY FUNCTIONS. TO DENY THIS PARTICIPATION OR TO PENALIZE A COMPANY FOR PARTICIPATING IN SUCH ACTIVITIES IS UNJUST. ASSOCIATION MEMBERSHIP FREQUENTLY IS THE MOST ECONOMICAL WAY FOR A COMPANY TO EXPRESS THEIR VIEWS ON VITAL NATIONAL ISSUES. IT CERTAINLY IS A NORMAL COST OF DOING BUSINESS, REGARDLESS OF GOVERNMENT OR PRIVATE SECTOR CLIENTS.

MANY STATES AUTHORIZE CORPORATE POLITICAL CONTRIBUTIONS WHICH ARE, NEEDLESS TO SAY, NOT CHARGEABLE TO GOVERNMENT OVERHEAD. THE FEDERAL ELECTION COMMISSION PERMITS PAC SOLICITATION OF FUNDS FROM SENIOR MANAGEMENT PERSONNEL UNDER ONE RULE AND SOLICITATION OF ALL EMPLOYEES AND SHAREHOLDERS UNDER ANOTHER.

I MENTION THESE ASPECTS TO SHOW THAT OUR COMPLEX POLITICAL ENVIRONMENT DOES NOT PERMIT A SIMPLE SOLUTION. THERE CAN BE NO PANACEA WHICH WILL EQUITABLY SORT OUT UNALLOWABLE ACTIVITIES, APPLY HARSH PENALTIES AND PERMIT EQUAL PARTICIPATION IN OUR POLITICAL PROCESSES.

IT IS EASY TO SAY THAT ANYONE WORKING ON CONTRACT FOR THE FEDERAL GOVERNMENT SHOULD NOT BE ALLOWED TO USE FEDERAL FUNDS FOR POLITICAL ADVOCACY. HOWEVER, SALARY PAID TO INDIVIDUALS CAN BE USED ANY WAY THEY WISH. AND, A CORPORATION HAS INDIVIDUAL STATUS UNDER OUR LAW. FURTHERMORE, THIS CIRCULAR WOULD PREVENT A CORPORATION FROM USING FUNDS AN INDIVIDUAL EARNED FROM THE PRIVATE SECTOR IF THAT INDIVIDUAL ALSO WORKED ON A GOVERNMENT CONTRACT.

THIS DENIAL OF NORMAL POLITICAL /ECONOMIC PARTICIPATION WITH SUCH STRINGENT PENALTIES IS WRONG. IF THIS CIRCULAR WAS PROPOSED BECAUSE THE CURRENT UNCOMPLICATED LAWS AND REGULATIONS ARE CONSIDERED TO BE UNWORKABLE BY THE GOVERNMENT, IMAGINE WHAT WILL WILL RESULT FROM CIRCULAR A-122.

WHAT IS FAIR AND EQUITABLE? CURRENTLY LOBBYING COSTS ARE NOT ALLOWABLE. BUT LOBBYING, PAC'S PARTICIPATION IN THE REGULATORY PROCESS AND THE FULL SPECTRUM OF POLITICAL ACTION CAN BE CONDUCTED BY A CORPORATION IF THESE COSTS ARE NOT CHARGED TO CONTRACT. WOULD THE PROVISIONS OF OMB CIRCULAR A-122 APPLY ONLY TO THE PRIME CONTRACTOR OR TO SUBCONTRACTORS AS WELL? WHAT WOULD BE THE LIABILITY OF A MAJOR DEFENSE CONTRACTOR WITH TENS OF THOUSANDS OF SUBCONTRACTORS?

THIS PROPOSED REVISION OF OMB CIRCULAR A-122 WOULD BE A DISASTER FOR INDUSTRY AND FOR INDUSTRIAL TRADE ASSOCIATIONS. WHERE ABUSES EXIST IN CURRENT LAWS AND REGULATIONS REMEDIAL ACTION SHOULD BE SOUGHT. BUT WE SHOULD NOT ARBITRARILY EXCLUDE THE INDUSTRY SUPPORTING THE CIVILIAN AND MILITARY AGENCIES OF OUR GOVERNMENT FROM THE VAST ARRAY OF POLITICAL/ECONOMIC ACTIVITIES THAT SHAPE OUR SOCIETY.



CORPORATIONS CURRENTLY MEMBERS

OF

THE NATIONAL COUNCIL OF

TECHNICAL SERVICE INDUSTRIES

BDM INTERNATIONAL/BDM MANAGEMENT SERVICES
 BOEING COMPUTER SERVICES COMPANY
 BOEING SERVICES INTERNATIONAL, INC.
 BURNS & ROE SERVICES CORPORATION
 CALCULON CORPORATION
 CERBERONICS, INC.
 CHEMFIX TECHNOLOGIES, INC.
 COMPUTER SCIENCES CORPORATION
 CONTROL DATA CORPORATION
 DATACROWN, INC.
 FEDERAL ELECTRIC CORPORATION
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 Telegraph Corporation
 HUGHES AIRCRAFT COMPANY
 KENTRON INTERNATIONAL, INC.
 LEAR SIEGLER, INC.
 LOCKHEED CORPORATION
 NORTHROP SERVICES, INC.
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 PLANNING RESEARCH CORPORATION
 RAYTHEON SERVICE COMPANY
 A Subsidiary of Raytheon Corporation
 RCA SERVICE COMPANY
 A Division of RCA
 RURAL METRO FIRE, INC.
 UNITED INFORMATION SERVICES, INC.
 VINNELL CORPORATION

February, 1983

Mr. BROOKS. Thank you very much.

Dr. Daoust, I have one question. Does your organization have purely informational contact with Government agencies that might be curtailed by the proposed OMB regulation?

Mr. DAOUST. Yes; we do. We have a great many, aside from the things that anyone can complain about, we have a great many functions where people call me from the Government and say "We need to know something" or "We have this opinion."

There is a great liaison function between particularly the executive branch of the Government and the companies in our association.

Many people, not knowing anyone else, turn to me to speak for industry on these support service type operations.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you very much, Mr. Chairman.

We appreciate your testimony. I think you were here this morning, so you heard our comments to Mr. Wright. I intend to follow up on that and hope that they will give more time to this revision.

I would urge you and others testifying here today to watch it very carefully and very closely. Our committee, of course, will be doing that.

I am sure we will be back here again if they come out with anything that we feel is counterproductive.

So I would urge you to be very careful.

I am sure that the chairman and I will cooperate, we will do everything to make certain that organizations such as yours and the others who testified are not going to be discriminated against as far as this type of regulation is concerned.

Mr. DAOUST. Thank you, Mr. Horton. I certainly recognize that comment that nothing is going to happen. You are right, except they have been using that so much, "Nothing is going to happen; you are not going to be executed until next month, not this month," it doesn't give you a good feeling.

Mr. HORTON. I understand that. I am certainly concerned with what they are attempting to do.

As I attempted to urge them this morning, they must do their homework before they really get into this very complicated thicket.

Mr. DAOUST. Thank you.

Mr. BROOKS. You might talk to some of your friends downtown, explain the problem to them.

Mr. DAOUST. Yes, sir.

Mr. BROOKS. Our next witness is Evan J. Kemp, Jr., executive director of the Disability Rights Center in Washington, D.C. Before joining DRC, Mr. Kemp was with the Division of Corporation Finance, Corporate Regulation, and Investment Management at the Securities and Exchange Commission.

Prior to his work with the SEC he was in the Office of the Chief Counsel of the Internal Revenue Service in Washington, D.C.

Mr. Kemp has been disabled since 1949.

He is accompanied today by Bonnie Milstein, who is a staff lawyer with the Center on Law and Social Policy in Washington, D.C.

We appreciate your being here, and you may proceed with your statement.

STATEMENT OF EVAN J. KEMP, JR., EXECUTIVE DIRECTOR, DISABILITY RIGHTS CENTER, WASHINGTON, D.C., DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., ACCOMPANIED BY BONNIE MILSTEIN, ATTORNEY, CENTER ON LAW AND SOCIAL POLICY

Mr. KEMP. Mr. Chairman, Congressman Horton, my name is Evan Kemp. I am executive director of the Disability Rights Center. I am appearing here today with Bonnie Milstein, attorney with the Center on Law and Social Policy. I am here to provide testimony on behalf of my organization and the Disability Rights Education and Defense Fund, Inc.

The Disability Rights Center, a nonprofit, tax-exempt corporation, is a public interest organization working to strengthen the rights of both physically and mentally disabled people. Since 1976 we have been committed to the enforcement of existing legislation granting rights to handicapped people.

The Disability Rights Education and Defense Fund, Inc., [DREDF], is a nonprofit, tax-exempt national research, education, community organizing, and advocacy organization dedicated to promoting the civil rights of disabled people.

DREDF provides information and support to a constituency network of over 5,000 disabled adults, parents of disabled children, community-based independent living centers and self-advocacy groups.

We are here to provide the committee testimony on the Office of Management and Budget's proposed "Cost Principles for Non-profit Organizations," published in the January 24, 1983, Federal Register.

We are extremely concerned with the broad impact these regulations will have on millions of disabled adults and parents of disabled children who only in the last decade have achieved a significant voice in the decisionmaking processes of our Government.

The large majority of disabled people are affiliated with nonprofit organizations that will be affected by the OMB proposed rules. Federal regulations already exist which forbid such organizations from lobbying or engaging in politics at taxpayers' expense. These expanded regulations on political activity are unnecessary, inequitable, and conflict with Federal mandates intended to integrate disabled adults and disabled children into society.

It is useful to look at two specific examples of this impact:

First is the area of regulatory reform and administrative policy setting. Over the past year the Department of Justice has been re-drafting coordination regulations implementing section 504 of the Rehabilitation Act of 1973. The Department of Justice, Civil Rights Division, has publicly stated that they intend to release the proposed rule for 10 public hearings and a 120-day comment period within the next month.

Section 504 is viewed by disabled people throughout the country as our major civil rights act. It was enacted to promote integration of disabled people into all phases of our society. Disabled people have responded over the past year with 40,000 letters to the White House and the Department of Justice outlining their concern with any proposed changes in section 504. Our single most important op-

portunity to be heard is through providing oral testimony and written comments at the 10 public hearings which will be held around the country. Yet OMB would foreclose this opportunity to most disabled people in the United States. The very existence of the OMB notice in the Federal Register is having a chilling effect on disabled people. They are concerned that if they take this opportunity to express their opinion on the regulations implementing section 504 they will lose necessary funding they receive to provide social services and other assistance to their communities.

A second example of this impact is in the area of independent living centers. In 1978 the Congress enacted title VII of the Rehabilitation Act of 1973. Title VII provides funds to establish community based independent living service centers. The major goal of the title is to provide funds for the establishment of programs that will assist disabled people to live independently, outside of institutions, and to promote self-sufficiency and leadership development. The title provides 3 years of funds to establish programs. It is expected that the independent living programs will maximize third party revenues in order to maintain their programs beyond the 3 years of Federal funds.

In order to comply with this the centers must be involved in all levels of decisionmaking—on the local, State, and Federal levels.

The proposed OMB rules will prohibit this necessary development of self-sufficiency for over 130 independent living programs nationwide.

The OMB rules will severely undermine the Federal mandates intended to promote equality of opportunity and integration into society for millions of disabled people. Disabled people will be denied the opportunity to receive information on governmental processes and to communicate this information to their communities and the general public.

The process of policymaking has called for the consideration of all points of view. Eliminating disabled people and their nonprofit programs from this process by expanding the concept of political activity and imposing the added burdens set out in the OMB rule is illogical and counterproductive.

Mr. Chairman and members of the committee, we appreciate the opportunity to be heard today.

Mr. Brooks. We appreciate your coming down. I have a couple of questions for you, Mr. Kemp.

What impact do you think these proposed regulations will have on the ability of disabled adults and parents of disabled children to speak out on regulatory reform activities and administrative policies?

Mr. KEMP. It would have a severe impact. The disability rights movement is very much of a grass roots movement. We have small organizations all over the country. They are basically nonprofit. Some do get Federal money. They are not big enough to be able to split up and have two entities, one that would handle so-called political activities and the other Government grants or contracts. It would have a severe impact on the disability rights movement throughout the country.

Mr. Brooks. An adverse impact?

Mr. KEMP. Yes; very adverse.

Mr. BROOKS. An impact can be either way.

Mr. KEMP. That is true.

Mr. BROOKS. Although the proposed regulations affect all disadvantaged people, in what ways will they more adversely affect disabled people?

Mr. KEMP. Disabled people are stereotyped by society. Disabled people are considered child-like, sick, and dependent. We know we are considered this way. Thus we tend to form groups to speak for us.

This is one way we are different from other disadvantaged people.

We are also a very young movement. There really wasn't a disability rights movement until about 10 years ago. Because of our youth and inexperience, Circular A-122 is going to hurt us more.

The mentally retarded and those who are very ill must have groups to speak for them.

These groups performed a great public service in representing all the people thrown off SSI and SSDI in the last couple of years. If A-122 went through, the very ill and severely retarded would be even more vulnerable to the whims of others than they are today.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

Mr. Kemp, I don't have any questions. I just want to thank you for your testimony. It is very effective.

Mr. BROOKS. Thank you for your excellent testimony. We are grateful to you and Ms. Milstein for coming down. Thank you very much.

Our next witnesses, representing the American Civil Liberties Union, will give their views on the constitutional implications of the OMB proposal.

John Shattuck, the director of ACLU's Washington office, is a graduate of the Yale Law School. Thomas J. Madden and David H. Remes are with the Washington office of Kaye, Scholer, Fierman, Hays & Handler.

We are delighted to have you gentlemen. We appreciate your comments. We will enter your prepared remarks in the record so you can lay out whatever you think is most essential.

STATEMENT OF JOHN SHATTUCK, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY THOMAS J. MADDEN, PARTNER, AND DAVID H. REMES, ASSOCIATE, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, WASHINGTON, D.C.

Mr. SHATTUCK. Thank you very much, Mr. Chairman.

The American Civil Liberties Union is very gratified to be invited to testify here at this treatment of what we consider to be a fundamental constitutional issue. There are, obviously, many ramifications of the proposed OMB regulation.

What we are particularly concerned about is what we think is its blatant, flat and sweeping violation of the first amendment to the Constitution and not only of a particular group of citizens but of millions of Americans who would be affected by this regulation.

Unlike many other invasions of first amendment rights, this one cuts right across the board; it affects millions of citizens.

Mr. Chairman, our statement will be presented by Mr. Thomas Madden, partner in the law firm of Kaye, Scholer, Fierman, Hays & Handler.

As a former Federal official of the Department of Justice and an expert on Government grants and contracts and a civil liberties advocate, Mr. Madden is uniquely qualified to present our views on this matter.

Mr. BROOKS. We will accept that for the record in full.

Mr. MADDEN. Thank you, Mr. Chairman. I would like to make a very brief statement.

Mr. BROOKS. The gentleman will proceed.

Mr. MADDEN. Mr. Chairman, it is the view of the——

Mr. HORTON. Would you yield a minute?

I have looked over your statement. It is a very good legal analysis of the problems involved here. I want to compliment you on it.

I realize you are not going to read it all. We appreciate that because of the time problem. It can be a bible for them downtown to guide them through some of this thicket I was talking about this morning.

Mr. MADDEN. Thank you, Congressman Horton.

Mr. Chairman, it is the view of the ACLU that the proposed political advocacy rule would impose drastic and wholly unwarranted restrictions on constitutionally-protected expression. It would superimpose a full-fledged system of censorship on contract and grant administration.

At the outset I would note that it is misleading to characterize the activities at issue here as "political advocacy" as OMB has done. The activities subject to the rule involve much more than lobbying and electioneering.

The activities covered by the rule would include virtually any statement or action that might directly or indirectly influence any governmental decision.

Ordinary and necessary costs of performing a contract or grant would simply be disallowed. For example, a Government contractor who receives a contract to build a new Government office building could not use contract funds to obtain Federal, State, or local permits, licenses, variances, or other necessary approvals.

By the same token, a nonprofit organization performing under a grant to provide services for disadvantaged children could not use grant funds to negotiate modification of State and local policies to maximize the availability of services for such children. An arts group whose very *raison d'être* is to perform dramatic works of topical moment would be barred altogether from receiving Federal funds to pay for the performance of such works.

The very purpose of this rule, we submit, is antithetical to first amendment core values. Speech that is meant to persuade is entitled to no less constitutional protection than speech that is meant to inform.

Yet the proposed rule would allow Federal contract and grant funds to be used only for neutral speech, and not for advocacy.

In our view the rule is therefore unconstitutional. The Supreme Court has declared that "Government has no power to restrict ex-

pression because of its message, its ideas, its subject matter, or its content."

As we explain in our prepared statement, none of OMB's proffered justifications for this content-based regulation is constitutionally sufficient. The rule would not promote sound contract and grant management. To the contrary, from the standpoint of contract and grant administration, the rule would be unworkable, contrary to effective and efficient use of appropriated funds, and in some respects entirely irrational.

In addition, there is no merit to OMB's claim that taxpayers somehow have a right to see that their tax dollars are not used to subsidize messages with which they disagree. There will always be someone who objects to the way his or her tax dollars were spent, and Government would grind to a halt if the dissenting taxpayer could veto any expenditure of which he or she did not approve.

Even if it were legitimate for the Government to try to restrict the use of Federal funds for political expression by contractors and grantees, the way OMB has chosen to do so is unjustifiably burdensome.

There is simply no reason to disallow the entire salary costs of anyone who engages in any degree of political advocacy. Partial allocation of such salary costs to the contract or grant should continue to be allowed, as it is under current law.

Nor is there any justification for requiring costly duplication of staff and facilities—especially for an organization that wishes to or must engage in political advocacy and performs under a Federal contract and grant funds, but does not have access to substantial nongovernmental funding.

Only recipients who could afford to split, amoeba-like, in two would be able to engage in both types of activities, political and nonpolitical alike. Few commercial contractors and even fewer non-profit grantees could accomplish this feat. This enormous, unnecessary burden on protected expression clearly violates the first amendment.

In addition, the very definition of political advocacy under the proposed rule is unconstitutionally vague. The rule would leave it entirely up to Government officials, acting as censors, to decide whether particular words or deeds constituted political advocacy.

What constitutes an attempt to influence public opinion generally, or governmental decisions in particular, is completely a matter of subjective judgment.

This regime of unbridled censorial power contrasts sharply with the existing system of lobbying and electioneering restrictions on recipients of Federal funds, on Federal employees, and on tax-exempt organizations.

Those restrictions address specific, narrow categories of behavior and entail no subjective inquiry into motive. The Supreme Court has very narrowly construed the concepts of lobbying and electioneering so as to avoid the very abuses of power that OMB's rule invites.

Finally, the political advocacy rule contains a myriad of exceptions and qualifications that cast serious doubt on the rule's basic sincerity.

When you realize that contractors and grantees may still issue highly influential messages to Government if asked to do so by the proper bodies you must come to the conclusion that it is not political advocacy as such that this rule targets but, rather political advocacy without the Government's permission.

In conclusion, Mr. Chairman, we do not believe that the proposed rule can be revised so as to cure its current defects without, in effect, rescinding the rule altogether.

For the very aim of the rule is impermissible—to go beyond existing lobbying and electioneering limitations and to strike at any expression that may influence the public in some way that may, in turn, affect governmental decisions.

We believe that there is no constitutional way to achieve this aim.

The ACLU believes that OMB should not merely revise its proposed rule, as it has already indicated it is prepared to do, but should abandon any effort to achieve the same result in some less provocative way. The first amendment will not tolerate what OMB proposes in any form.

Mr. BROOKS. Thank you.

Mr. Horton?

Mr. HORTON. Thank you very much.

Do you foresee any constitutional problems other than first amendment problems with the present proposal?

Mr. MADDEN. I think there are constitutional problems in a couple of other ways. One was referred to by one of the earlier witnesses. That is the question of whether or not there is a violation of the due process clause of the fifth amendment, whether or not that due process clause arises out of violation of protected liability interests, also whether or not the executive branch has the authority under a separation of powers doctrine to in effect prevent contractors and grantees from bringing to the attention of Congress and Members of the legislature their concerns about Government programs, the concerns about the operation of their activities.

Congress has already spoken through various riders to appropriations bills, 18 U.S.C. § 1913, as to what limitations on lobbying it deems appropriate. In doing so it stretched the Constitution to its limit. For the executive branch to go beyond that without any authority I think creates very serious constitutional problems.

Mr. HORTON. OMB cites several court cases as legal authority for its proposal. Do these cases support those proposed rule changes?

Mr. MADDEN. Mr. Chairman, I believe they do not. I would be glad to submit something for the record on that particular point.

Mr. HORTON. I think that would be helpful for the committee.

Mr. MADDEN. OK. We looked at each of those cases and feel they do not provide the necessary support.

[The information follows:]

In support of its proposed rule, OMB cites seven cases, all of which cut against, not in favor, of the rule.

Wooley v. Maynard held only that government may not coerce individuals into serving as personal couriers for official messages. This, in a way, was also the meaning of West Virginia Board of Education v. Barnette. OMB has simply offered no evidence that federal contract or grant programs are being abused in this manner.

Elrod v. Burns stands for the proposition that employment of non-policymaking state officials may not be conditioned on association with a political party. OMB has not suggested that access to federal contract or grant funds is today being conditioned on political affiliation. Moreover, the cure for government favoritism under Elrod is to make the government benefit available on a neutral basis, and not to withdraw it, as OMB proposes.

Aboud v. Detroit Board of Education held that individuals who are required by law to support unions for collective bargaining purposes cannot be required to subsidize union activities not germane to collective bargaining. This is a far cry from saying, as OMB says, that taxpayers cannot be made to support "political advocacy" activities that are in fact germane to statutory contract and grant purposes. In fact, Buckley v. Valeo, a case not cited by OMB, supports precisely the opposite conclusion -- namely, that a taxpayer has no First Amendment right to insist that his or her tax dollars be spent only to spread those messages with which the taxpayer agrees.

OMB does correctly cite NAACP v. Button and In re Primus for the proposition that litigation may constitute a form of "political advocacy." But OMB fails to appreciate that this fact makes restrictions on litigation activity more difficult, not easier, to justify.

Finally, OMB misstates the thrust of Civil Service Commission v. National Association of Letter Carriers. In Letter Carriers, the Court declared it fundamental that Executive Branch employees should administer the law in accord with the will of Congress, rather than in accord with their own views or with the will of a political party. But the Court made this general observation in affirming the validity of restrictions barring federal employees from taking formal positions in political parties, from undertaking to play substantial roles in partisan political campaigns, and from running for office on partisan political tickets. It is activities such as these, the Court recognized, that Congress deemed a threat to the faithful administration of its will. Federal contractors and grantees are already barred from using appropriated funds for such activities. The logic of OMB's reliance on Letter Carriers would thus subject federal contractors and grantees to restrictions even more stringent than those imposed on federal employees.

Mr. HORTON. I have one other question I will ask and we will have others that we will submit to you for written responses.

Does this rule impose an unconstitutional condition on the receipt of Federal funds?

Mr. MADDEN. I think it does impose——

Mr. HORTON. I realize you are not the Supreme Court, but——

Mr. MADDEN. I think in reviewing the decisions of the Supreme Court it is very clear that this does impose an unconstitutional restraint on receipt of Federal funds in a number of fashions. It is a regulation that is based on content of speech and it regulates that content of the speech in the way in which it imposes what I think is a very severe penalty for exercise of free speech, by proposing to disallow all of the costs involved in advocacy of an individual who perhaps spends 5 percent or 10 percent of his or her time on advocacy.

The rule is clearly intended to penalize that person for that particular speech. That raises significant constitutional problems.

There are vagueness issues that I referred to briefly. Basically under this rule they do not provide the kind of clear guidance the Supreme Court has said is necessary for restrictions of freedom of speech.

In previous congressional enactments such as 18 U.S.C. § 1913 the Congress very narrowly defined the limitations on free speech that would apply to recipients of Federal funds. They have limited that to lobbying.

Lobbying is a well understood term and there is a substantial basis for such restrictions. None of those are here.

That creates constitutional problems.

In our detailed statement we provide other reasons such as the improper discriminatory effect of the rule on certain kinds of speech.

Mr. HORTON. Thank you very much.

Thank you very much, Mr. Shattuck, Mr. Madden, and Mr. Remes. We appreciate your testimony.

Mr. SHATTUCK. Thank you.

[Messrs. Madden's and Remes' prepared statement and responses to Mr. Brooks' questions follow:]

COMMENTS OF
AMERICAN CIVIL LIBERTIES UNION
ON "POLITICAL ADVOCACY" RULE

Prepared by
Thomas J. Madden and David H. Remes
Kaye, Scholer, Fierman, Hays & Handler
Washington, D.C.

Feb. 24, 1983

This submission represents the comments of the American Civil Liberties Union ("ACLU") on the proposed revision to the Office of Management and Budget ("OMB") Circular A-122, "Cost Principles for Nonprofit Organizations." 48 Fed. Reg. 3348 (Jan. 24, 1983).¹ The ACLU is a nationwide, non-partisan organization of more than 250,000 members devoted to the protection of individual rights and liberties. The ACLU does not receive any of its funds from federal contracts or grants.

SUMMARY AND EFFECT OF THE PROPOSED RULE

The proposed rule, on its face, would disallow the use of federal contract or grant funds to underwrite activities defined as "political advocacy," Sec. (a); as demonstrated below, the practical effect of the rule

¹ The OMB notice announced that parallel versions of the rule embodied in the proposed revision of Circular A-122 would be proposed for civilian and defense contractors by the Department of Defense, NASA, and the General Services Administration. 48 Fed. Reg. 3348 (1983). The proposed OMB rule would consist of a new paragraph "B 33 Political Advocacy," to be inserted in Circular A-122. 48 Fed. Reg. 3350 (1983). References herein to the rule will be to sections of that new paragraph B 33.

would be to disallow recipients of federal contract and grant funds from engaging in such activities altogether. The rule would require federal contractors and grantees to maintain completely separate staff, office space, and equipment for activities constituting "political advocacy," Sec. (f), for salaries and any other costs could not be apportioned between contract or grant work, on the one hand, and "political advocacy," on the other. See 48 Fed. Reg. 3349-50 (1983) (informational appendix).

Under the proposed rule, "political advocacy" is defined broadly enough to encompass virtually any statement or action by any federal contractor or grantee that could conceivably have any effect on anybody. Thus, "political advocacy" would seemingly encompass activities ranging from the exhibition of controversial artwork or the production of a topical play by federally-funded arts groups, to publication of a newsletter by an association of state and local governments to its members discussing developments in federal grant law; from a defense contractor's efforts to obtain a variance from a local zoning board to permit expansion of a facility for defense contract work, to the submission of comments by public health insurers on proposed regulations bearing on the administration of their contract or grant programs.

Any activity, in short, that could possibly be construed as an "attempt" to "influence" the public on political matters, or otherwise to "influence" any "governmental decision," would fall within the rubric of "political advocacy" under the proposed rule. See Sec. (b)(1), (3), (4), (6).² The proposed rule would completely disallow use of federal funds to underwrite such activities, even if such activities were indisputably related to the purpose of the federal contract or grant. And the proposed rule would appear to place on the recipient of the federal funds the burden of proving that such funds were not used in any way to underwrite such activities.

From the standpoint of contract and grant administration, the proposed rule would be unworkable, contrary to effective and efficient use of government funding, and in some respects wholly irrational. Ordinary and necessary costs of performing a contract or grant would simply be disallowed. As noted above, for example, a government contractor who receives a contract to build a new government office building could not use contract funds to obtain federal, state, or local permits, licenses, variances, or other necessary approvals. Approval

² See infra Part II. Also included in the definition of "political advocacy" are participation in litigation as an amicus curiae, Sec. (b)(5), and various forms of support for a political action committee, Sec. (b)(2).

for the provision of such fundamental services as sewerage, traffic, or gas and electricity for contract projects could not be sought using federal funds.

By the same token, a nonprofit organization performing under a grant to assist battered wives, for example, could not use grant funds to negotiate modification of state and local policies to maximize the availability of services for such wives. And, as noted above, an arts group whose very raison d'être is to perform dramatic works of topical moment would be barred altogether from receiving federal funds to pay for such performance.³

Inevitably, the proposed rule not only would serve to limit the activities undertaken by contractors or grantees themselves under federal contract or grant programs, but would serve to limit the contract and grant programs offered by federal agencies pursuant to statutory mandate. Needless to say, if contract or grant costs for

3 Also affected would be nonprofit associations of state and local government officials and entities -- for example, the National Governors Association, the National League of Cities, the National Conference of State Legislators, the National Association of Counties, and the U.S. Conference of Mayors -- who currently receive federal funds for communicating to their members information on new government policies; for serving as clearinghouses for information on effective projects developed by individual members of such associations; and for developing model laws, regulations, ordinances, and policies. Under the proposed rule, the use of federal funds for virtually all such purposes may well be deemed nonallowable.

certain activities are disallowed, contract and grant funds simply will not be made available for such activities in the first instance, even if fully within an agency's discretion to make available under its mandate from Congress.

THE PROPOSED RULE IS UNCONSTITUTIONAL ON ITS FACE

Vulnerable as the proposed rule would be from a contract and grant administration standpoint, the rule would be subject to attack on even more fundamental grounds. Despite OMB's claim that its rule is motivated by "concern for protecting the free and robust interchange of ideas," 48 Fed. Reg. 3348 (1983), the proposed "political advocacy" rule is unconstitutional for three reasons. First, the very purpose of the rule -- to restrict expression on the basis of its content -- is one that the First Amendment forbids government to pursue, absent a showing of compelling justification and unavoidable necessity. No such showing has been or can be made here. Second, even if such a showing could be made, the definition of "political advocacy" under the proposed rule is unconstitutionally vague, leaving to the subjective judgment of government officials whether particular activities constitute such advocacy. Third, by virtue of its exceptions and qualifications, the proposed rule unconstitutionally discriminates among those to whom it will directly or indirectly apply.

The proper test for whether a particular use of federal funds should be allowed is whether that use of funds is reasonably related to the purposes of the grant or contract involved and is otherwise lawful. OMB, by contrast, proposes to single out expression on the basis of its "political" content, and to decree that such expression may not be underwritten with federal funds -- regardless of whether such expression is reasonably related to grant or contract purposes. The use of federal funds to underwrite other, non-"political" expression would continue to be allowed. Because the "political advocacy" rule offends the First Amendment for the reasons set forth herein, the rule is unconstitutional and, accordingly, should not be promulgated.

I. The "Political Advocacy" Rule Would
Constitute a Forbidden Content-Based
Restriction on Expression Protected
By The First Amendment.

A. The Proposed Rule Is Presumptively
Unconstitutional.

It is settled that, even when an individual or group has no independent right to a particular benefit, the government may not grant or withhold that benefit on a basis that infringes freedom of expression or any other

constitutionally protected right. Perry v. Sindermann, 408 U.S. 593, 597 (1972); Pickering v. Board of Education, 391 U.S. 563, 568, 574 (1968). By the same token, even where the government might deny a benefit without giving any reason at all, it cannot predicate the denial of a benefit on an impermissible reason -- such as its desire to suppress disfavored expression. See Perry v. Sindermann, *supra*; Thomas v. Review Board, 101 S. Ct. 1425, 1431 (1981).

Thus, at the outset, it should be recognized that the fact that no one has a right to receive federal contract or grant funds does not mean that the government is free to impose any restrictions it may choose on the use of such funds, or impose restrictions on the use of such funds for improper motives. Nor can governmental restrictions on protected expression by private parties be automatically upheld on the basis of "the special interests of a government in overseeing the use of its property." Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 540 (1980). Any restrictions that are imposed must themselves be constitutionally permissible. The restrictions embodied in the "political advocacy" rule are not.⁴

4 Needless to say, more than the rights of federal contractors and grantees are at stake, for "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." First National Bank v. Bellotti,

The "political advocacy" rule avowedly discriminates between expression that is meant to inform and expression that is meant to persuade, allowing the use of federal funds to underwrite "neutral" speech but not "political advocacy." But the Supreme Court long ago recognized that "[t]he First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." Thomas v. Collins, 323 U.S. 516, 537 (1945).⁵ Thus the Supreme Court has declared that "the fact that advocacy may persuade . . . is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less

(Footnote Continued)

435 U.S. 765, 783 (1978). See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977). Any content-based restriction on the use of federal funds by contractors or grantees thus burdens the First Amendment rights of the public as well as those of the recipients of such funds. See Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); Kleindienst v. Mandel, 408 U.S. 753, 764-65 (1972) (dictum); Lamont v. Postmaster General, 381 U.S. 301, 305 (1965). It is irrelevant to First Amendment analysis that the purpose of the speech involved may be to promote an organization's purposes under a federal contract or grant, and not some disinterested civic purpose. See Virginia State Board of Pharmacy, 425 U.S. at 761-65; Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 628-32 (1980).

⁵ Citing Abrams v. United States, 250 U.S. 616, 626 (1919) (Holmes, J., joined by Brandeis, J., dissenting), and Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., joined by Brandeis, J., dissenting).

than that which is unconvincing.'" First National Bank v. Bellotti, 435 U.S. 765, 790 (1978), quoting Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959).

Any rule that discriminates against persuasive expression as such is therefore presumptively unconstitutional, for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department v. Mosley, 408 U.S. 92, 95 (1972). See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (invalidating state ban on advertising of prescription drug prices); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) (invalidating state utility commission order prohibiting inclusion in monthly bills of inserts discussing "controversial" issues of public policy).

B. The Proposed Rule's Justifications
Are Constitutionally Insufficient

Because the "political advocacy" rule is a regulation "directed at speech itself, and the speech is intimately related to the process of governing," First National Bank v. Bellotti, 435 U.S. at 786 (footnote

omitted),⁶ the rule will not withstand constitutional challenge unless it can satisfy two exacting criteria. First, as justification for the rule, the government must demonstrate "a subordinating interest which is compelling," Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), "and the burden is on the government to show the existence of such an interest," Elrod v. Burns, 427 U.S. 347, 362 (1976). See Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

Second, even if such a compelling justification can be adduced, the rule will not survive unless it has been "closely drawn to avoid unnecessary abridgment of [protected] freedoms." Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam).⁷ But the "political advocacy" rule is not supported by any compelling governmental objective, and, even if it were, the rule is not tailored to serve the government's proffered objectives in the

6 The proposed rule specifically includes within its definition of "political advocacy" attempts to influence ballot choices and "governmental decisions." Sec. (b)(1), (3). See Sec. (e) (defining "governmental decisions").

7 See Thomas v. Review Board, 101 S. Ct. at 1431-32; Memorial Hospital v. Maricopa County, 415 U.S. 250, 256-59 (1974); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Hunter v. Erickson, 393 U.S. 385, 386-91 (1969); United States v. Jackson, 390 U.S. 570, 582-83 (1968); Sherbert v. Verner, 374 U.S. 398, 404-07 (1963).

least restrictive manner possible.⁸

OMB advances three justifications for the "political advocacy" rule. First, OMB suggests that the proposed rule advances the government's goal of "sound management of federal grants and contracts."⁹ Second, OMB contends that the rule is warranted to assure that the use of federal funds will not infringe constitutional rights or distort the political process "by encouraging or discouraging certain forms of political activity."¹⁰

8 Notwithstanding OMB's suggestion to the contrary, justifying the proposed rule does not merely involve a demonstration that the rule represents a "balance" between governmental interests and First Amendment rights. 48 Fed. Reg. 3348 (1983). As noted above, the rule may be justified only if it satisfies the exacting standards that apply to any content-based restriction on protected expression. Indeed, precisely because protected expression is at stake, neither OMB nor any other federal agency should be deemed to have authority to "curtail or dilute" such expression without the clearest statement of congressional intent to authorize such regulation. See Kent v. Dulles, 357 U.S. 116, 129-30 (1958).

9 48 Fed. Reg. 3348 (1983). Under its "sound management" rationale, OMB asserts that the "diversion" to "political advocacy" of federal funds is an "abuse of the system and an uneconomical, inefficient and inappropriate use of the public's resources." Id. OMB also asserts that "the neutral, non-ideological administration of federally funded programs" is impeded by "the appearance of federal support for particular positions in the public debate." Id. The proposed rule, OMB maintains, would correct these problems.

10 48 Fed. Reg. 3348 (1983). Under this "burden on speech and distortion of elections" rationale, OMB maintains that the proposed rule would prevent the government both from interfering with or controlling the exercise of protected rights by those who receive federal funds, and from indirectly influencing the outcome of elections by subsidizing private political expression. Id.

Third, OMB argues that the rule "will ensure, to the extent consistent with the communications function of the government, that taxpayers are not required, directly or indirectly, 'to contribute to the support of an ideological cause [they] may oppose.'"¹¹ None of these justifications can withstand close examination.

(1) The "sound management" rationale. This rationale is entirely conclusory. Nothing in the OMB notice indicates why the supposed "diversion" of federal funds to so-called "political advocacy" is either "uneconomical" or "inefficient." Moreover, OMB's characterizations of such "diversion" as "inappropriate" and "an abuse of the system" simply restate the rationale behind the proposed rule without justifying it. Indeed, to suggest that the use of federal funds to underwrite "political advocacy" is "uneconomical" or "inefficient" from a grant or contract management standpoint is also merely to restate the rule's rationale -- if the premise of this suggestion is that such use of federal funds is improper

¹¹ 48 Fed. Reg. 3348 (1983), quoting Abood v. Detroit Board of Education, 431 U.S. 209, 235 (1977). As a corollary either of this "dissenting taxpayer" rationale or of the second rationale, or of both, OMB also argues that the rule is warranted to negate any inference that, by making funds available to groups with particular viewpoints, the government has itself endorsed those viewpoints. Id.

and therefore a waste.¹²

If the premise of OMB's suggestion is instead that disallowance of the use of federal funds to underwrite "political advocacy" is warranted to reduce the costs and burdens of administering federal grants and contracts, then the short answer is that such a justification, even if otherwise supportable, is constitutionally insufficient. See Schneider v. New Jersey, 308 U.S. 147, 162 (1939); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 639 (1980). But that justification is impossible to support in any event, for the proposed rule, by commanding close government scrutiny of contractor and grantee activity for proscribed "political advocacy" -- and by defining such advocacy in a manner certain to generate dispute, see infra Part II -- would unavoidably increase rather than reduce administrative costs and burdens.¹³

12 The Acting Deputy Associate Director for Administration evidently assumes that any funds used to underwrite activities defined as "political advocacy" have, ipso facto, been "diverted from statutory purposes." 48 Fed. Reg. 3349 (1983). Such a sweeping assumption is plainly unfounded. Surely it is within the statutory purpose of a defense procurement contract, for example, for a defense contractor to seek a "governmental decision" in its favor when a variance is needed to permit expansion of a contract work facility. Private "political advocacy" thus may well be integral to the execution of a statutory grant or contract program.

13 OMB argues that the current system creates "the appearance of federal support for particular positions in the public debate." OMB then seems to contend that eliminating that appearance would remove an obstacle to

(2) The "burden on speech and distortion of elections" rationale. The difficulty with this rationale is that the proposed rule is not the least restrictive means of treating the supposed problem. If the government fears that allowing federal funds to be used to underwrite "political advocacy" will somehow burden the exercise of First Amendment rights by recipients of such funds, then the obvious solution is to assure that such funds are truly made available with no strings attached -- and not to ban the use of such funds to underwrite the protected activities. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748, 770 -71 (1976).¹⁴ Similarly, if the government fears

(Footnote Continued)

"the neutral, non-ideological administration of federally funded programs." How a public perception of federal partisanship could interfere with contract or grant administration is left unexplained.

¹⁴ See also Joyner v. Whiting, 477 F.2d 456, 461-62 (4th Cir. 1973) (sustaining the right of state-subsidized college newspaper to publish editorial on controversial subject, holding that the First Amendment allows government to "spend money to publish . . . positions on controversial subjects"). OMB's reliance on Wooley v. Maynard, 430 U.S. 705 (1977) is entirely misplaced. First, OMB has offered no support for its suggestion that any aspect of federal grant or contract administration is politically coercive. Second, the fact is that in Wooley the Supreme Court tacitly accepted Justice Rehnquist's observation in dissent that the citizens of New Hampshire could indeed be compelled to pay, through their taxes, for the cost of erecting and maintaining billboards proclaiming "Live Free or Die," even if they could not be compelled to display that proclamation on their own license plates. 430 U.S. at 721. See L. Tribe, American Constitutional Law, 590 n.8 (1978). This is not to suggest, of course, that the government could compel recipients of federal funds to espouse particular political viewpoints.

that its awards of contract and grant funds may somehow bias the electoral process by subsidizing private "political advocacy," then the solution is to guarantee that such awards are made on a completely neutral basis, without regard to the recipient's politics -- and not to disallow the use of federal funds to underwrite protected activities.¹⁵

More fundamentally, to advance as a justification for the proposed rule the goal of shielding the electoral process from governmental influence is ludicrously under-inclusive. For as OMB itself is bound to acknowledge, "[t]he activities of government in a democracy necessarily involve a degree of political advocacy." 48 Fed. Reg. 3348 (1983). But OMB offers no explanation for its conclusion that the use of federal funds for "political advocacy" by contractors or grantees is somehow more of a "distortion of the market place of ideas" than the use of federal resources for such purposes by the President and his appointees, or by Members of Congress and their staffs. That such supposed "distortion" is sought to be avoided only when the

15 OMB's citation to Elrod v. Burns, 427 U.S. 347, 356 (1976), is wholly inapposite. Elrod stands for the proposition that the employment of non-policymaking state officials may not be conditioned on association with a political party; OMB has not suggested that the current system conditions access to contract or grant funds on political affiliation. Indeed, mandating that such funds be available to all, without regard to political affiliation, is wholly consistent with Elrod.

speakers happen to be private parties, and not when the speakers are government officials, casts into serious question the genuineness of the government's professed interest in avoiding such "distortion," and "the plausibility of the [government's] purported concern." First National Bank v. Bellotti, 435 U.S. at 793. See also Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104-05 (1979); id. at 110 (Rehnquist, J., concurring in judgment).¹⁶

In any event, the notion that the government's support for "political advocacy" by private parties impermissibly "distorts" the political system is itself unfounded. So long as government remains neutral with respect to religion, the Supreme Court has declared, the use of "public money to facilitate and enlarge public discussion . . . furthers, not abridges, . . . First Amendment values." Buckley v. Valeo, 424 U.S. at 92-93.

(3) The "dissenting taxpayer" rationale. This rationale, too, must fail both because the proposed rule is a patently under-inclusive means of achieving the goal of protecting such taxpayers, and because the rule is far

¹⁶ It bears emphasis that OMB has offered no evidence that such "distortion" has occurred under the current system, or that any appreciable portion of contract or grant funds has been used for purposes unrelated to the contracts or grants, or that the responsible agencies have been generally unable to recover funds improperly expended on such unrelated purposes. Cf. Buckley v. Valeo, 424 U.S. at 93 n.127.

from the least restrictive means available for achieving that goal. Any notion that a taxpayer has some right to insist that his tax dollars not be spent on causes he opposes is obviously untenable: "[E]very appropriation made by Congress uses public money in a manner to which some taxpayers object." Buckley v. Valeo, 424 U.S. at 191-92 (footnote omitted). Dissatisfaction with the uses to which one's tax dollars are put is an unavoidable fact of life under our system of government.

Even if taxpayers had a right to direct on a case-by-case basis the uses to which their tax dollars were put, the proposed rule does not genuinely promote that goal. To bar private parties from using federal funds to underwrite "political advocacy," without prohibiting government officials from using federal funds for such purposes, scarcely solves the dissenting taxpayer's problem. Moreover, even assuming that a taxpayer might legitimately complain that the current system somehow channels his tax dollars solely into causes he opposes, the solution, again, would be to assure that his tax dollars are made available to contractors and grantees on a completely neutral basis, so that those tax dollars would at least be spent on causes of which the taxpayer approves, as well as on those with which he

disagrees. Buckley v. Valeo, 424 U.S. at 92-93.¹⁷

C. The Proposed Rule's Disallowance Provisions Are Unjustifiably Burdensome

Each of the justifications offered by OMB in support of the "political advocacy" rule therefore falls woefully short of the standards imposed by the First Amendment, and for this reason alone the proposed rule is unconstitutional. In addition, the proposed rule is unconstitutional because its Draconian disallowance provisions are unjustifiably burdensome.

¹⁷ Nor does Abood v. Detroit Board of Education, 431 U.S. 209 (1977), support OMB's position. A federal contractor or grantee executing statutory program responsibilities can hardly be likened to a labor union organized for collective bargaining purposes, and the taxpayers whose tax dollars are made available to such contractors or grantees through the federal government can hardly be likened to union members. Moreover, although the Supreme Court in Abood held that individuals who are forced by law to help defray the expenses of a labor union may object to the use of their contributions for political purposes unrelated to collective bargaining activities, the Court in Abood also ruled that such individuals could not object to the use of their contributions for advocacy activities germane to "the cause which justified bringing the group together." 431 U.S. at 222-23, quoting International Association of Machinists v. Street, 367 U.S. 740, 778 (1961) (Douglas, J., concurring). Surely no analogy to Abood can therefore invalidate compelled contribution by taxpayers to "political advocacy" by a federal contractor or grantee on matters germane to the federal contract or grant.

Under the current system, recipients of federal funds may separate out that portion of their activities devoted to nonallowable purposes when computing their costs under a contract, or when allocating their expenses under a grant. The "political advocacy" rule would preclude such an approach. An officer of a defense contractor who spends 20% of his time on activities deemed to constitute "political advocacy" under the proposed rule could have none of his salary paid out of federal funds, even if he devoted the other 80% of his time to allowable activity. Sec. (f)(1)(a). A public health insurer that devotes 15% of its energy to "political advocacy" could use no federal funds to pay the rent for the building at which it engaged in such disallowed activity, even if the remaining 85% of the activities in which the insurer engaged on the premises were allowable. Sec. (f)(2)(a).

The upshot of these disallowance provisions is that any individual or organization that seeks to receive federal contract or grant funds must literally split, amoeba-like, in two if such individual or organization wishes to engage in "political advocacy" and perform under a federal contract or grant contemporaneously. This, of course, is impossible in the case of individual grantees. A nonprofit organization would be required to

have two executive directors -- one to administer the contract or grant, the other to serve organization purposes involving "political advocacy." An association of state and local governments would be required to rent, furnish, and staff two suites of offices -- one to use for contract or grant purposes, the other to use for association purposes involving "political advocacy."

As a practical matter, this is an impossibility for any organization which provides service to the public -- such as a public health organization, a domestic counselling service, or any public service provider. This is so because, by definition, a public service provider must necessarily advocate the viewpoint of its constituency (e.g., those whose interests are at stake in family planning counselling or the provision of housing for the elderly). Furthermore, fundraising by any private organization necessarily involves advocacy of that organization's point of view in such a way as to influence public opinion. See Buckley v. Valeo, 424 U.S. at 20-21 (recognizing that political solicitation and contribution are themselves expressive acts); id. at 241, 244 (Burger, C.J., concurring in part and dissenting in part).

There is simply no justification for this overwhelming burden on "political advocacy." To the extent that such advocacy is actually related to grant or contract purposes, such burdens are wholly irrational.

Nor are the proposed disallowance provisions likely to simplify contract or grant administration for the government, since those provisions do not eliminate any potential for subterfuge, and in fact magnify policing difficulties by requiring government officials to closely monitor both the quality and quantity of each recipient's activities under the vaguely-defined "political advocacy" rubric. Even if the proposed disallowance provisions might indeed simplify contract or grant administration, the fact that they might do so could not justify the burdens imposed. See Schneider v. New Jersey, supra.

But the true evil of OMB's proposed disallowance provisions involves more than their irrationality. For the proposed disallowance provisions would tend to disqualify from receiving contract or grant funds those organizations that could not afford to split in two in order to engage in "political advocacy" while performing a federal contract or grant. The expense of duplication imposed by the proposed disallowance provisions might well be prohibitive in many instances, and individuals or organizations might thus be forced to forgo "political advocacy" altogether in order to qualify for federal contract or grant funds. In this respect, the proposed rule would impermissibly condition the receipt of public benefits upon the sacrifice of constitutional rights. See,

e.g., Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 593-94 (1926); Sherbert v. Verner, 374 U.S. 398, 404 (1963); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); Western & Southern Life Insurance Co. v. State Board of Equalization, 101 S. Ct. 2070, 2077 (1981). The government may not impose financial restrictions on First Amendment rights without regard to the deterrent effect of such restrictions on all but those groups blessed with a "full purse." Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

Indeed, if the withholding of an otherwise available tax benefit because of one's exercise of a protected right is a forbidden penalty on the exercise of such right, see Speiser v. Randall, 357 U.S. 513, 518 (1958); First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958), it is difficult to understand why the withholding of otherwise available contract or grant funds because of one's desire to engage in "political advocacy" without costly duplication of facilities and staff would not also constitute a forbidden penalty on the exercise of protected rights. The duplication requirement would in effect penalize those individuals and groups committed to "political advocacy," while favoring those individuals and groups not so committed. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

For these reasons, the "political advocacy" rule would be unjustifiably burdensome even if the rule's objectives were compelling, and even if no less restrictive means were available to serve those objectives than the flat disallowance of the use of federal funds to underwrite the proscribed activities. But even if, in addition, the "political advocacy" rule's disallowance provisions themselves could be justified, the rule would nevertheless offend the First Amendment for the further reasons set forth below.

II. The Definition of "Political Advocacy" is Impermissibly Vague.

The proposed rule defines "political advocacy" with varying degrees of clarity. On the one hand, "political advocacy" is defined as supporting a political action committee in various specified ways, Sec. (b)(2), and as participating in or contributing to the expenses of litigation as an amicus curiae, Sec. (b)(5).¹⁸ Other

¹⁸ That participation as an amicus curiae may be a clearly defined activity does not mean, of course, that any proscription of the use of federal funds to underwrite such activity is automatically valid. Whatever other reasons may be available to justify proscribing the use of federal funds for amicus curiae participation, the use of such funds for that purpose cannot be proscribed on the ground that the activity involved constitutes "political advocacy," for such a motive is impermissibly content-based.

aspects of the definition of "political advocacy," on the other hand, are quite vaguely defined. Thus, all attempts to influence the outcome of any popular vote, Sec. (b)(1), or to influence any governmental decision either through attempts to affect the opinions of the general public or any segment thereof, Sec. (b)(3), or though "communications" with any public official or government body, Sec. (b)(4), are defined as "political advocacy."¹⁹ As noted above, this definition of "political advocacy" could encompass virtually any statement or action by a recipient of federal grant or contract funds that has any effect on anybody.

But the rule's definition of "political advocacy" nowhere explains what constitutes an "attempt" to "influence" a popular vote or a governmental decision -- expression meant to persuade rather than simply to inform. And no reliable distinction between "neutral" expression and "political advocacy" is indeed possible. Certainly the two kinds of expression cannot be distinguished on the basis of their content: Dry recitations of fact are often far more influential than impassioned pleas. Nor may the two types of speech be

¹⁹ Also defined as "political advocacy" is any support provided by a recipient of federal grant or contract funds to any organization "that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year on activities constituting political advocacy." Sec. (b)(6).

distinguished on the basis of their effect: Surely it would be irrational to define "advocacy" as expression that does in fact persuade. Finally, it would be impermissible to distinguish "advocacy" from "neutral" expression on the basis of the speaker's perceived intent: That way lies censorship in its most pernicious form. As the Supreme Court has declared in an analogous context:

[T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means [what the government has precluded him from saying].

Thomas v. Collins, 323 U.S. at 535. Cf. In re Primus, 436 U.S. 412, 433 (1978).²⁰

Because of the vagueness with which "political advocacy" is defined under the proposed rule, recipients of federal grant and contract funds would be discouraged

²⁰ In a vain effort to distinguish between expression meant to inform and expression meant to persuade, the proposed rule exempts from its definition of "political advocacy" "[m]aking available the results of nonpartisan analysis, study, or research, the distribution of which is not primarily designed to influence the outcome of any [popular vote] or any governmental decision." Sec. (c)(1). How it can be determined whether any given document is truly "nonpartisan," and is "not primarily designed" to achieve a forbidden effect, is not explained.

from using federal funds to engage in any activity that could possibly be construed by hostile officials as "attempts" to "influence" any popular vote or governmental decision. Contractors and grantees would be required "to 'steer far wider of the unlawful zone,' than if the boundaries of the forbidden areas were clearly marked[,] . . . restricting their conduct to that which is unquestionably safe." Baggett v. Bullitt, 377 U.S. 360, 372 (1964), quoting Speiser v. Randall, 357 U.S. 513, 526 (1958).

As a result, performance of federal contracts and grants would be inescapably impaired. Worse still, recipients would be encouraged not to engage in potential "political advocacy" even with non-government funds, lest such activity invite suspicion of an improper purpose in their use of federal funds.²¹ For under the "political advocacy" rule, recipients would be unable to tell whether they had used federal funds to underwrite proscribed activities: "[M]en of common intelligence must necessarily guess at [the rule's] meaning.'" Hynes v. Mayor and Council of Oradell,

²¹ Similar consequences may be expected to follow from the rule's proscription of the use of federal funds to underwrite "communications" with public officials or government bodies -- a proscription that theoretically could reach newspaper advertisements, public speeches, testimony before government bodies, one-on-one social contact with officials, or, indeed, any message uttered within earshot of a public servant.

425 U.S. 610, 620 (1976), quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

Government officials, on the other hand, would have no guide other than their own prejudices for determining whether a particular activity of a particular recipient is proscribed; the potential for "'arbitrary and discriminatory enforcement'" is clear, see Smith v. Goguen, 415 U.S. 566, 573 (1974), for the rule plainly "furnishes a convenient tool for 'harsh and discriminatory enforcement . . . against particular [organizations] deemed to merit [official] displeasure.'" Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972), quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

Thus, for example, an arts group's performance of a play with an anti-war theme could be construed as "political advocacy" intended to influence public opinion against increased military expenditures or some aspect of current foreign policy; a corporate executive's address to a meeting of the Business Roundtable on some issue of topical interest could be construed as "political advocacy" intended to shape opinion on that issue, and hence to "influence" governmental decisions; or the sponsorship by a group of state and county governments of a forum on issues of concern to such governments could be construed as "political advocacy," intended as a "communication" with

those public officials who attend the forum, or who are otherwise apprised of the proceedings, for the purpose of "influencing" governmental decisions.

In such cases, much could turn on the message espoused, when government officials undertook to decide whether or not the expression at issue constituted "political advocacy." The First Amendment cannot countenance any such regime of arbitrary government power; the chilling potential for such subjective, content-based determinations by government is sufficient to render such vague language unconstitutional on its face. See, e.g., Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1034-39 (D.C. Cir. 1980) (invalidating Treasury regulation definition of "educational" on vagueness grounds).²² For this reason, too, the proposed rule must be rejected.

III. The "Political Advocacy" Rule Unconstitutionally Discriminates Among Those To Whom It Will Directly or Indirectly Apply.

The final set of objections to the "political advocacy" rule is perhaps the most telling, for these objections go to the fundamental sincerity of the rule.

²² Although in some circumstances a narrowing construction of vague language may avoid the "constitutional deficiencies" of such vagueness, Buckley v. Valeo, 424 U.S. at 43, no such narrowing construction is available here, where the proposed rule encompasses virtually all speech that touches on "political" issues, and not simply speech, for example, "advocat[ing] the election or defeat of a clearly identified candidate for federal office." Id. at 44 (footnote omitted).

Even a cursory review of the rule's provisions reveals at once that the rule's target is not the use of federal funds to underwrite "political advocacy" as such, but rather the use of federal funds for such purposes without a special invitation from the government to do so. Thus, the rule excludes from the definition of "political advocacy" the provision of "technical advice or assistance" to a governmental body at its request, Sec. (c)(2), and participation in litigation as an amicus curiae if the federal contract or grant expressly so authorizes, Sec. (c)(3).

Needless to say, the provision of "technical advice and assistance" to a governmental body may be far more influential on governmental decisions than an advertisement addressed to the very same subject in the Washington Post, and there is no rational basis at all for designating amicus curiae participation as "political advocacy" only when the government has not expressly authorized it.²³ These exemptions, then, discriminate between those whom the government has invited to influence its decisions, and those to whom it has extended no such invitation.

23 Although the Acting Deputy Associate Director for Administration correctly notes that "attempts to influence policy through the judicial process are a form of political advocacy," 48 Fed. Reg. 3350 (1983), that fact only makes it more difficult, not easier, to justify government restrictions on litigation activity.

In addition, the "political advocacy" rule discriminates between those organizations that "acknowledge" their "political advocacy" as a "substantial organizational purpose" and those that do not, Sec. (d)(1). The cost of such candor under the rule is that any use of federal grant or contract funds to support such organizations is automatically disallowed. Sec. (b)(6). A more straightforward penalty for engaging in protected speech is difficult to imagine.

Finally, the proposed rule discriminates among contractors and grantees on the basis of the pressures they are perceived to exert on their employees to join or support other organizations, or to engage in "political advocacy" off the job. Sec. (f)(1). These discriminations are the most bizarre of all those embodied in the proposed rule, for they disallow an employee's entire salary not on the basis of what the employee does for the contractor or grantee, but rather on the basis of what the employee does for some other organization with his own money -- or what he does on his own, with or without making any expenditure at all. Thus, under the proposed rule, the salary costs of individuals who are "required or induced" to join or pay dues to any "political advocacy" organization other than a labor union are totally disallowed, Sec. (f)(1)(b), as are the salary costs of

individuals who are "required or induced" to engage in "political advocacy" during non-working hours. Id.

These discriminations are objectionable on at least two grounds. First, what it means for a contractor or grantee to "require or induce" an employee to join or support another organization, or to engage in "political advocacy" off-hours, is an unanswered question under the proposed rule -- an unanswered question that invites the arbitrary exercise of government power at the expense of First Amendment freedoms. For example, if most of the employees of a nonprofit organization happen to belong to the American Civil Liberties Union, will that fact give rise to an inference that the nonprofit organization has somehow "induced" its employees to join the ACLU? What is the test? Whose burden of proof? Or if many of an organization's employees undertake activities on behalf of anti-abortion groups in their off-hours, would that fact give rise to an inference that the organization had somehow "induced" its employees to engage in "political advocacy" off the job? What is the test? Whose burden of proof?

By disallowing the employee's entire salary under either circumstance, the rule will not simply discourage contractors and grantees from "requiring" or "inducing" their employees to join or support "political advocacy" organizations or to engage in "political

advocacy" off the job; the result will be that employees of contractors and grantees will themselves shy away from membership in or support for disfavored organizations or activities off-hours, lest their conduct be somehow "traced" to their employers and their salaries accordingly disallowed. Whether viewed as a chill on the exercise of protected rights either by contractors and grantees or by their employees, this aspect of the "political advocacy" rule clearly violates the First Amendment.

Second, even assuming that the government could legitimately aim to assure that salaries paid with federal funds by contractors or grantees could not be channeled to disfavored organizations or activities, total disallowance of salaries used to any degree for such purposes is plainly an unjustifiable burden. More fundamentally, this aspect of the proposed rule impermissibly discriminates between organizations that may be supported by contributions from employees of contractors or grantees at the behest of their employers, and those that may not. Why labor unions, but not other "political advocacy" organizations, may benefit from employee contributions at the behest of contractors or grantees is wholly unexplained. And the rule's more general discrimination between "political advocacy" organizations and other organizations for disallowance purposes is constitutionally untenable as well.

CONCLUSION

In sum, the "political advocacy" rule is riddled with constitutional infirmities, and, for the reasons set forth above, the American Civil Liberties Union urges that the proposed rule not be promulgated.

ACLU Submissions
to Additional Questions
from Chairman Jack Brooks

Question 1: Is there statutory authority for the Administration's proposed rule changes?

Answer: Although we have undertaken a review solely of the constitutional issues raised by the Administration's proposed rule, the analysis of the Administration's statutory authority for the rule, prepared by Jack Maskell, Legislative Attorney, Congressional Research Service, appears sound.

Question 2: Would the Administration's proposed rule changes favor the awarding of grants and contracts to organizations that are willing to give up their right to participate in the governmental process?

Answer: Yes. The proposed rule changes would do so by virtue of their draconian disallowance provisions, which would forbid reimbursement of any portion of the salary of any person who devoted any time to any "political advocacy," or any portion of the expense of any other item devoted in any degree to "political advocacy." As a result of such disallowance provisions, a contractor would be required to split, amoeba-like, in two in order to perform under a contract or grant and, at the same time, engage in "political advocacy." Few contractors or grantees could bear the expense of doing so; those who undertook to perform contracts and grants would, as a result, find their ability to engage in "political advocacy" using non-government funds severely restricted, and their ability to participate in the governmental process drastically curtailed. In addition, the very thrust of the proposed rule changes is to proscribe participation in the governmental process under a contract or grant; by definition, therefore, the proposed rule changes would favor those organizations who were willing to perform contracts or grants that precluded participation in the governmental processes using government funds.

Question 3: Would this rule encourage favoritism among groups in that only those who receive no Federal funds or those who are expressly invited to communicate with the Government would be allowed to do so without penalty?

Answer: Yes. The rule would permit the use of government funds to underwrite "political advocacy" by those who receive a special invitation from government officials or bodies to do so; those whom government officials did not favor, and thus did not invite to speak, would be precluded from speaking on an equal footing with those whom government officials did favor, and hence invited to speak.

Mr. HORTON. We next will hear from Mr. Donald G. Jones, executive secretary of the Wisconsin Community Action Program Association, Inc., in Madison, Wis.

Mr. Jones formerly was the executive director of the Community Action Commission for the city of Madison and Dane County, Wis.

He also was a training officer for the Leadership Institute for Community Development here in Washington and served nearly 12 years in the U.S. Army with service in Germany and the Republic of Vietnam. He serves on the boards of a number of community organizations and has a degree in political science from the University of Wisconsin.

STATEMENT OF DONALD G. JONES, EXECUTIVE SECRETARY, WISCONSIN COMMUNITY ACTION PROGRAM ASSOCIATION, INC., MADISON, WIS.

Mr. JONES. Mr. Chairman, thank you very much for permitting me to be here today.

Mr. Chairman and members of the House Government Operations Subcommittee on Legislation, I wish to thank you for providing me this opportunity to appear before you today to comment on the OMB proposed regulation that appeared in the January 24 Federal Register on Provisions for Cost Accounting Principles for Non-profit Organizations under A-122.

I understand that these regulations are to be revised shortly but my concerns on this issue are fundamental and generally applicable.

Mr. Chairman, I wish to take a few minutes to highlight several points and respectfully request that my prepared testimony be made part of your hearing record. This prepared testimony has appended to it a list of nonprofit organizations in Wisconsin that have asked me to speak on their behalf and I also request permission to provide the committee with the complete list within the next few days.

These organizations work with and on behalf of low-income families, children, senior citizens, handicapped, and blind persons and the developmentally disabled and mentally ill.

Mr. Chairman and committee members, as a program administrator who has been involved with human service programs for more than 14 years, I ask that the proposed revisions of A-122 be carefully scrutinized for the impact that they will have on the effective, efficient operation of both nonprofit organizations and government agencies at the Federal, State, and local level.

Mr. HORTON. I might say, parenthetically, I have heard from a number of my community action groups in my congressional district, which is the 29th District of New York, and I certainly am concerned about this issue, as you are. Your testimony is very good with regard to the views of the community action programs.

Mr. JONES. I appreciate your concern, Mr. Horton.

My concerns are as follows: First, at the outset, it is important to note that even without the adoption of the proposed revisions to A-122 there is no question that nonprofit organizations may not lobby or participate in political action with Federal grant or contract

funds. Clear requirements to this effect have been enacted by Congress.

The nonprofit organizations opposing these regulations do not in any way challenge the validity or rationale of these requirements. Nor do the organizations challenge the enforcement mechanisms designed and implemented by Congress and the administration to make sure that these requirements are met.

Such enforcement efforts typically include program audits, general accounting investigations, and other means of assuring that Federal funds are not used for lobbying and political action.

The opposition to the A-122 revisions revolves around those provisions which are considered to be unnecessary and illegal expansions of the existing requirements.

Second, the proposed revisions would expand the scope of restricted activities to include virtually all forms of participation in governmental decisionmaking at the Federal, State, and local level.

Thus, for example, the circular's restrictions would apply to almost every effort to communicate at all levels of government with officials or employees or the general public on administrative decisions or policies.

In Wisconsin private nonprofit and charitable organizations such as those I represent here today interact regularly with agencies at the town, village, city, county, and State level as well as with Federal agencies.

In our State, nonprofits are both officially encouraged and expected to freely communicate with elected and appointed officials and administrators on technical and policy matters affecting these groups and individuals.

We in Wisconsin perceive advocacy and technical cooperation as a positive plus.

This proposed revision would reach out from the Federal level of Government to thwart and disrupt the historic cooperation between Government and nonprofit organizations which has resulted over the years in outstanding services and strong governmental financial and policy leadership in assisting the disadvantaged and the community.

I currently serve on the board of directors of the Wisconsin Council on Human Concerns which was founded by the Governor of the State over 100 years ago to provide a means through which governmental leaders, professional human service providers and, community leaders can regularly confer and actively work with the State to improve services and policies.

The council is comprised of leaders in the private sector, the Government, and nonprofit organizations of all kinds. This revision of A-122 would make the participation of many members in this historic group impossible and in so doing undermine the value and effectiveness of this successful effort.

Third, I am concerned that these regulations seek to interfere with and regulate communications and relationships between nonprofit organizations and the general public.

In response to the increased need for assistance to individuals and families and cutbacks in resources from all quarters, nonprofit organizations came together 2 years ago in a broad working coalition called the Wisconsin Difference.

The Wisconsin Difference Coalition has three major goals: (1) to assess the absolute minimum needs in human services; (2) to communicate to State and local governments our best professional assessment on solutions to meet those needs; and (3) to insure cooperation and coordination of programs to maximize effective allocation of scarce resources.

This proposal would damage the coalition by: (A) It would shut off our ongoing dialog with governments on how to stretch the available dollars with the maximum of services possible.

For example, as knowledgeable technicians, we have been able to analyze and prioritize key programs which meet critical needs and have both low operational budgets and high cost effectiveness. These programs will be retained in the State budget because they prevent high remedial expenditures and will pay for themselves in the short and long term.

(B) It would drastically curtail, if not eliminate, the dialog within the human service agency community which is vital to the efficient delivery of services.

Most of the agencies involved have Federal grants and contracts. A few do not. Those with Federal dollars would rightfully be fearful that after-the-fact costs charged to Federal grants could be disallowed merely because they had participated in discussions with agencies who, with private funds, had spoken out on behalf of their constituencies in a manner defined by OMB as political activity. It would have a deep chilling effect on all. It has begun to do so already.

Fourth, the adoption of the proposed A-122 revisions would result in added costs and paperwork for the Federal Government and its grantees and contractors.

Many nonprofit organizations are relatively small and receive funds from various public and private resources. Cost sharing, or cost allocation, is the common way for these organizations to maximize the use of resources, including Federal dollars.

A Federal grant may pay for one-half of a typewriter, or two-thirds of the time of a staff person. The proposed restrictions would eliminate this way of doing business.

A Federal grant would have to pay for the full cost of typewriter or staff persons, even if only part-time use was required.

Another problem would be presented concerning the time of an executive director who is responsible for overseeing the operation of the agency which may run programs funded with Federal, State, and private money.

Grants and contracts usually demand a share of the time by the executive director to assure top-level management and accountability. The board of directors of any organization also demands that the chief executive be fully responsible for all operations.

The proposed regulations would make it impossible for any executive director to fulfill both these essential functions. Thus, this regulation would reach far beyond the Federal grant activity or contract and dictate what a private corporation, chartered under State law, can and cannot do in carrying out the provisions of that charter with private funds.

Mr. Chairman and members of the committee, the proposed revisions of A-122 reach out and attack the rights and obligations of

the private sector as well as voluntary organizations which have both Federal and private dollars, to speak out on behalf of low-income families, of disabled and mentally ill people, of young children and of frail senior citizens, who cannot speak for themselves, and depend on our help for day to day survival.

At this point it may be well to point out there are many types of groups to be affected by the proposed A-122 revisions and their counterparts for Federal contracts: large national service organizations and private companies, as well as smaller local organizations which provide direct help to individuals.

Community action agencies are a prime example of this latter category. Unlike the larger organizations, CAAS, and the groups like them, simply will not be able to participate in the kind of free-speech activities covered by the proposed A-122 revisions if they cannot mix or allocate costs in some reasonable way.

They cannot afford to have two of everything: two executive directors, two buildings, two printing presses, et cetera, one for federally funded activity and one for communication to Federal, State, and local government officials and the public regarding matters critical to their programs. Larger organizations can do that. Smaller ones, particularly those serving the poor, cannot.

Along these lines I must express concern about the most recent issuance from OMB in which the administration indicated several areas in which it was actively soliciting specific proposals from affected parties.

These areas went primarily to the definition of the term "political advocacy." They did not address the cost allocation issue so critical to the smaller nonprofits.

The issuance of this paper and other recent developments suggest that OMB may be offering a compromise to quell the tremendous controversy regarding A-122. The only problem is the apparent direction of the compromise would help only large organizations, not the smaller poverty organizations upon whose behalf I speak. They would remain out in the cold.

Fifteen years ago this month, February, I went through the Tet offensive in Vietnam. Little did I realize that I would have to fight again to permit the private, voluntary sector in the United States to communicate with Government agencies that fund human service programs or the needy citizens who are served. I urge you to look with great skepticism on these new restrictions and thank you for holding hearings.

I am particularly pleased with the level of skepticism which you and the chairman have expressed this morning. I want to thank you very much for holding these hearings and for giving this a public airing.

[Mr. Jones' prepared statement follows:]

TESTIMONY OF

DONALD JONES

MADISON, WISCONSIN

BEFORE

HOUSE GOVERNMENT OPERATIONS

SUBCOMMITTEE ON LEGISLATION

MARCH 1, 1983

ORGANIZATIONS REPRESENTED

LEAGUE OF WOMEN VOTERS-WISCONSIN
 WISCONSIN COMMUNITY ACTION PROGRAM ASSOCIATION, INC.
 WISCONSIN NUTRITION PROJECT
 WISCONSIN ASSOCIATION OF FAMILY AND CHILDREN' AGENCIES
 UNITED CEREBRAL PASLY OF WISCONSIN
 CENTER FOR PUBLIC REPRESENTATION
 WISCONSIN COUNCIL ON HUMAN CONCERNS
 WISCONSIN DISABILITY COALITION
 WISCONSIN EARLY CHILDHOOD ASSOCIATION
 YOUTH POLICY AND LAW CENTER
 ALLIANCE FOR THE MENTALLY ILL
 WISCONSIN ASSOCIATION OF RUNAWAY SERVICES
 PLANNED PARENTHOOD OF WISCONSIN
 NATIONAL ASSOCIATION OF SOCIAL WORKERS, WISCONSIN CHAPTER
 WISCONSIN WOMEN'S NETWORK
 WISCONSIN ASSOCIATION OF HEAD START DIRECTORS

MR CHAIRMAN AND MEMBERS OF THE HOUSE GOVERNMENT OPERATIONS SUBCOMMITTEE ON LEGISLATION, I WISH TO THANK YOU FOR PROVIDING ME THIS OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO COMMENT ON THE OMB PROPOSED REGULATION THAT APPEARED IN THE JANUARY 24th FEDERAL REGISTER ON REVISIONS FOR COST ACCOUNTING PRINCIPLES FOR NON PROFIT ORGANIZATIONS UNDER A-122. I UNDERSTAND THAT THESE REGULATIONS ARE TO BE REVISED SHORTLY BUT MY CONCERNS ON THIS ISSUE ARE FUNDAMENTAL AND GENERALLY APPLICABLE.

MR CHAIRMAN, I WISH TO TAKE A FEW MINUTES TO HIGHLIGHT SEVERAL POINTS AND RESPECTFULLY REQUEST THAT MY PREPARED TESTIMONY BE MADE PART OF YOUR HEARING RECORD. THIS PREPARED TESTIMONY HAS APPENDED TO IT A LIST OF NON PROFIT ORGANIZATIONS IN WISCONSIN THAT HAVE ASKED ME TO SPEAK ON THEIR BEHALF AND I ALSO REQUEST PERMISSION TO PROVIDE THE COMMITTEE WITH THE COMPLETE LIST WITHIN THE NEXT FEW DAYS. THESE ORGANIZATIONS WORK WITH AND ON BEHALF OF LOW INCOME FAMILIES, CHILDREN, SENIOR CITIZENS, HANDICAPPED AND BLIND PERSONS AND THE DEVELOPMENTALLY DISABLED AND MENTALLY ILL.

MR CHAIRMAN AND COMMITTEE MEMBERS, AS A PROGRAM ADMINISTRATOR, WHO HAS BEEN INVOLVED WITH HUMAN SERVICE PROGRAMS FOR MORE THAN 14 YEARS, I ASK THAT THE PROPOSED REVISIONS OF A-122 BE CAREFULLY SCRUTINIZED FOR THE IMPACT THAT THEY WILL HAVE ON THE EFFECTIVE, EFFICIENT OPERATION OF BOTH NON PROFIT ORGANIZATIONS AND GOVERNMENT AGENCIES AT THE FEDERAL STATE AND LOCAL LEVEL. MY CONCERNS ARE AS FOLLOWS:

FIRST AT THE OUTSET, IT IS IMPORTANT TO NOTE THAT EVEN WITHOUT THE ADOPTION OF THE PROPOSED REVISIONS TO A-122, THERE IS NO QUESTION THAT NON PROFIT ORGANIZATIONS MAY NOT LOBBY OR PARTICIPATE IN POLITICAL

ACTION WITH FEDERAL GRANT OR CONTRACT FUNDS. CLEAR REQUIREMENTS TO THIS EFFECT HAVE BEEN ENACTED BY CONGRESS. THE NON PROFIT ORGANIZATIONS OPPOSING THESE REGULATIONS DO NOT IN ANY WAY CHALLENGE THE VAILIDITY OR RATIONALE OF THESE REQUIREMENTS. NOR DO THE ORGANIZAIONS CHALLENGE THE ENFORCEMENT MECHANISMS DESIGNED AND IMPLEMENTED BY CONGRESS AND THE ADMINISTRATION TO MAKE SURE THAT THESE REQUIREMENTS ARE MET SUCH ENFORCEMENT EFFORTS TYPICALLY INCLUDE PROGRAM AUDITS, GENERAL ACCOUNTING INVESTIGATIONS AND OTHER MEANS OF ASSURING THAT FEDERAL FUNDS ARE NOT USED FOR LOBBYING AND POLITICAL ACTION. THE OPPOSITION TO THE A-122 REVISIONS REVOLVES AROUND THOSE PROVISIONS WHICH ARE CONSIDERED TO BE UNNECESSARY AND ILLEGAL EXPANSIONS OF THE EXISTING REQUIREMENTS.

SECOND THE PROPOSED REVISIONS WOULD EXPAND THE SCOPE OF RESTRICTED ACTIVITIES TO INCLUDE VIRTUALLY ALL FORMS OF PARTICIPATION IN GOVERNMENTAL DECISION MAKING AT THE FEDERAL, STATE AND LOCAL LEVEL. THUS FOR EXAMPLE, THE CIRCULAR'S RESTRICTIONS WOULD APPLY TO ALMOST EVERY EFFORT TO COMMUNICATE AT ALL LEVELS OF GOVERNMENT WITH OFFICIALS OR EMPLOYEES OR THE GENERAL PUBLIC ON ADMINISTRATIVE DECISIONS OR POLICIES. IN WISCONSIN, PRIVATE NON PROFIT AND CHARITABLE ORGANIZATIONS SUCH AS THOSE I REPRESENT HERE TODAY, INTERACT REGULARLY WITH AGENCIES AT THE TOWN, VILLAGE, CITY, COUNTY AND STATE LEVEL AS WELL AS WITH FEDERAL AGENCIES. IN OUR STATE, NON PROFITS ARE BOTH OFFICALLY ENCOURAGED AND EXPECTED TO FREELY COMMUNICATE WITH ELECTED AND APPOINTED OFFICIALS AND ADMINISTRATORS ON TECHNICAL AND POLICY MATTERS AFFECTING THESE GROUPS AND INDIVIDUALS. WE, IN WISCONSIN, PRECEIVE ADVOCACY AND TECHNICAL COOPERATION AS A POSITIVE VALUE. THIS PROPOSED REVISION WOULD REACH OUT FROM THE FEDERAL LEVEL OF GOVERNMENT TO THWART AND DISRUPT THE HISTORIC COOPERATION BETWEEN GOVERNMENT AND NON PROFIT

ORGANIZATIONS WHICH HAS RESULTED OVER THE YEARS IN OUTSTANDING SERVICES AND STRONG GOVERNMENTAL FINANCIAL AND POLICY LEADERSHIP IN ASSISTING THE DISADVANTAGED AND THE COMMUNITY. I CURRENTLY SERVE ON THE BOARD OF DIRECTORS OF THE WISCONSIN COUNCIL ON HUMAN CONCERNS WHICH WAS FOUNDED BY THE GOVERNOR OF THE STATE OVER 100 YEARS AGO TO PROVIDE A MEANS THROUGH WHICH GOVERNMENTAL LEADERS, PROFESSIONAL HUMAN SERVICE PROVIDERS AND COMMUNITY LEADERS CAN REGULARLY CONFER AND ACTIVELY WORK WITH THE STATE TO IMPROVE SERVICES AND POLICIES. THE COUNCIL IS COMPRISED OF LEADERS IN THE PRIVATE SECTOR, THE GOVERNMENT AND NON PROFIT ORGANIZATIONS OF ALL KINDS. THIS REVISION OF A-122 WOULD MAKE THE PARTICIPATION OF MANY MEMBERS IN THIS HISTORIC GROUP IMPOSSIBLE AND IN SO DOING UNDERMINE THE VALUE AND EFFECTIVENESS OF THIS SUCCESSFUL EFFORT.

THIRD I AM CONCERNED THAT THESE REGULATIONS SEEK TO INTERFERE WITH AND REGULATE COMMUNICATIONS AND RELATIONSHIPS BETWEEN NON PROFIT ORGANIZATIONS AND THE GENERAL PUBLIC. IN RESPONSE TO THE INCREASED NEED FOR ASSISTANCE TO INDIVIDUALS AND FAMILIES AND CUTBACKS IN RESOURCES FROM ALL QUARTERS, NON PROFIT ORGANIZATIONS CAME TOGETHER TWO YEARS AGO IN A BROAD WORKING COALITION CALLED THE WISCONSIN DIFFERENCE. WISCONSIN DIFFERENCE HAS THREE IMPORTANT GOALS: 1) TO ASSESS THE ABSOLUTE MINIMUM NEEDS IN HUMAN SERVICES; 2) TO COMMUNICATE TO STATE AND LOCAL GOVERNMENTS OUR BEST PROFESSIONAL ASSESMENT ON SOLUTIONS TO MEET THOSE NEEDS AND 3) TO INSURE COOPERATION AND COORDINATION OF PROGRAMS TO MAXIMIZE EFFECTIVE ALLOCATION OF SCARCE RESOURCES. THIS PROPOSAL WOULD SEVERELY DAMAGE THE COALITION BY:

- A) IT WOULD SHUT OFF OUR ONGOING DIALOGUE WITH GOVERNMENTS ON HOW TO STRETCH THE AVAILABLE DOLLARS WITH THE MAXIMUM OF SERVICES POSSIBLE. FOR EXAMPLE, AS KNOWLEDGEABLE TECHNICHANS, WE HAVE

BEEN ABLE TO ANALYZE AND PRIORITIZE KEY PROGRAMS WHICH MEET CRITICAL NEEDS AND HAVE BOTH LOW OPERATIONAL BUDGETS AND HIGH COST EFFECTIVENESS. THESE PROGRAMS WILL BE RETAINED IN THE STATE BUDGET BECAUSE THEY PREVENT REMEDIAL EXPENDITURES AND WILL PAY FOR THEMSELVES IN THE SHORT AND LONG TERM.

- B) IT WOULD DRASTICALLY CURTAIL, IF NOT ELIMINATE, THE DIALOGUE WITHIN THE HUMAN SERVICE AGENCY COMMUNITY WHICH IS VITAL TO THE EFFICIENT DELIVERY OF SERVICES. MOST OF THE AGENCIES INVOLVED HAVE FEDERAL GRANTS AND CONTRACTS, A FEW DO NOT. THOSE WITH FEDERAL DOLLARS WOULD RIGHTFULLY BE FEARFUL THAT AFTER THE FACT, COSTS CHARGED TO FEDERAL GRANTS COULD BE DISALLOWED MERELY BECAUSE THEY HAD PARTICIPATED IN DISCUSSIONS WITH AGENCIES WHO, WITH PRIVATE FUNDS, HAD SPOKEN OUT ON BEHALF OF THEIR CONSTITUENCIES IN A MANNER DEFINED BY OMB AS "POLITICAL ACTIVITY." IT WOULD HAVE A DEEP CHILLING EFFECT ON ALL.

FOURTH, THE ADOPTION OF THE PROPOSED A-122 REVISIONS WOULD RESULT IN ADDED COSTS AND PAPERWORK FOR THE FEDERAL GOVERNMENT AND ITS GRANTEEES AND CONTRACTORS. MANY NON PROFIT ORGANIZATIONS ARE RELATIVELY SMALL AND RECEIVE FUNDS FROM VARIOUS PUBLIC AND PRIVATE RESOURCES. COST SHARING - OR COST ALLOCATION - IS THE COMMON WAY FOR THESE ORGANIZATIONS TO MAXIMIZE THE USE OF RESOURCES, INCLUDING FEDERAL DOLLARS. A FEDERAL GRANT MAY PAY FOR ONE HALF OF A TYPEWRITER, OR TWO THIRDS OF THE TIME OF A STAFF PERSON. THE PROPOSED RESTRICTIONS WOULD ELIMINATE THIS WAY OF DOING BUSINESS. A FEDERAL GRANT WOULD HAVE TO PAY FOR THE FULL COST OF TYPEWRITER OR STAFF PERSONS - EVEN IF ONLY PART TIME USE WAS

REQUIRED. ANOTHER PROBLEM WOULD BE PRESENTED CONCERNING THE TIME OF AN EXECUTIVE DIRECTOR WHO IS RESPONSIBLE FOR OVERSEEING THE OPERATION OF THE AGENCY WHICH MAY RUN PROGRAMS FUNDED WITH FEDERAL, STATE AND PRIVATE MONEY. GRANTS AND CONTRACTS USUALLY DEMAND A SHARE OF THE TIME BY THE EXECUTIVE DIRECTOR TO ASSURE TOP LEVEL MANAGEMENT AND ACCOUNTABILITY. THE BOARD OF DIRECTORS OF ANY ORGANIZATION ALSO DEMAND THAT THE CHIEF EXECUTIVE BE FULLY RESPONSIBLE FOR ALL OPERATIONS. THE PROPOSED REGULATIONS WOULD MAKE IT IMPOSSIBLE FOR ANY EXECUTIVE DIRECTOR TO FULFILL BOTH THESE ESSENTIAL FUNCTIONS. THUS, THIS REGULATION WOULD REACH FAR BEYOND THE FEDERAL GRANT ACTIVITY OR CONTRACT AND DICTATE WHAT A PRIVATE CORPORATION, CHARTERED UNDER STATE LAW, CAN AND CAN NOT DO IN CARRYING OUT THE PROVISIONS OF THAT CHARTER WITH PRIVATE FUNDS.

MR CHAIRMAN AND MEMBERS OF THE COMMITTEE, THE PROPOSED REVISIONS OF A-122 REACH OUT AND ATTACK THE RIGHTS AND OBLIGATIONS OF THE PRIVATE SECTOR AS WELL AS VOLUNTARY ORGANIZATIONS WHICH HAVE BOTH FEDERAL AND PRIVATE DOLLARS - TO SPEAK OUT ON BEHALF OF LOW INCOME FAMILIES, OF DISABLED AND MENTALLY ILL PEOPLE, OF YOUNG CHILDREN AND OF FRAIL SENIOR CITIZENS. - WHO CAN NOT SPEAK FOR THEMSELVES AND DEPEND ON OUR HELP FOR DAY TO DAY SURVIVAL.

AT THIS POINT, IT MAY BE WELL TO POINT OUT THERE ARE MANY TYPES OF GROUPS TO BE AFFECTED BY THE PROPOSED A-122 REVISIONS AND THEIR COUNTER-PARTS FOR FEDERAL CONTRACTORS: LARGE NATIONAL SERVICE ORGANIZATIONS AND PRIVATE COMPANIES, AS WELL AS SMALLER LOCAL ORGANIZATIONS WHICH PROVIDE DIRECT HELP TO INDIVIDUALS. COMMUNITY ACTION AGENCIES ARE A PRIME EXAMPLE OF THIS LATTER CATEGORY. UNLIKE THE LARGER ORGANIZATIONS,

CAAS -- AND THE GROUPS LIKE THEM -- SIMPLY WILL NOT BE ABLE TO PARTICIPATE IN THE KIND OF FREE SPEECH ACTIVITIES COVERED BY THE PROPOSED A-122 REVISIONS IF THEY CANNOT MIX OR ALLOCATE COSTS IN SOME REASONABLE WAY. THEY CANNOT AFFORD TO HAVE TWO OF EVERYTHING: TWO EXECUTIVE DIRECTORS, TWO BUILDINGS, TWO PRINTING PRESSES, ETC. -- ONE FOR FEDERALLY FUNDED ACTIVITY AND ONE FOR COMMUNICATION TO FEDERAL, STATE, AND LOCAL GOVERNMENT OFFICIALS AND THE PUBLIC REGARDING MATTERS CRITICAL TO THEIR PROGRAMS. LARGER ORGANIZATIONS CAN DO THAT, SMALLER ONES -- PARTICULARLY THOSE SERVING THE POOR -- CANNOT.

ALONG THESE LINES, I MUST EXPRESS CONCERN ABOUT THE MOST RECENT ISSUANCE FROM OMB IN WHICH THE ADMINISTRATION INDICATED SEVERAL AREAS IN WHICH IT WAS "ACTIVELY SOLICITING SPECIFIC PROPOSALS" FROM AFFECTED PARTIES. THESE AREAS WENT PRIMARILY TO THE DEFINITION OF THE TERM "POLITICAL ADVOCACY," THEY DID NOT ADDRESS THE COST ALLOCATION ISSUE SO CRITICAL TO THE SMALLER NON PROFITS.

THE ISSUANCE OF THIS PAPER AND OTHER RECENT DEVELOPMENTS SUGGEST THAT OMB SOON MAY BE OFFERING A COMPROMISE TO QUELL THE TREMENDOUS CONTROVERSY REGARDING A-122. THE ONLY PROBLEM IS: THE APPARENT DIRECTION OF THE COMPROMISE WOULD HELP ONLY LARGE ORGANIZATIONS, NOT THE SMALLER POVERTY ORGANIZATIONS UPON WHOSE BEHALF I SPEAK. THEY WOULD REMAIN OUT IN THE COLD.

FIFTEEN YEARS AGO THIS MONTH, I WENT THROUGH THE TET OFFENSIVE IN VIET NAM. LITTLE DID I REALIZE THAT I WOULD HAVE TO FIGHT AGAIN TO PERMIT THE PRIVATE, VOLUNTARY SECTOR IN THE UNITED STATES TO COMMUNICATE WITH GOVERNMENT AGENCIES THAT FUND HUMAN SERVICE PROGRAMS OR THE NEEDY CITIZENS WHO ARE SERVED. I URGE YOU TO LOOK WITH GREAT SKEPTICISM ON THESE NEW RESTRICTIONS AND THANK YOU FOR HOLDING HEARINGS.

Mr. HORTON. Thank you very much, Mr. Jones.

How will this proposal affect nonprofit organizations' delivery of services at the local level?

Mr. JONES. I think there is a great deal of concern that the regulations as they are proposed may go directly to the actual services themselves and define the services as political activity.

In some cases the activity that is required by Federal grants and contracts or by private funds which are received by organizations require that there be advocacy on the part of persons who cannot assist themselves such as children who are up for adoption, refugees who are being placed, blind and disabled, mentally ill persons who cannot speak for themselves.

If these organizations are prohibited from talking to zoning boards, to county boards of social services, and to speak with each other, those organizations which are federally granted and those which are not, I would fear that the regulation would go directly to say that the actual provision of service itself becomes a political activity under the definition of the revision.

Mr. HORTON. Very good point. Thank you very much, Mr. Jones, and we appreciate your being here with us today.

Our next witness is Bill West, executive director of the Association for Retarded Citizens of Pennsylvania, which is headquartered in Harrisburg. I go right by there all the time when I am driving from here to Rochester, where my district is.

Mr. West has worked in the area of developmental rehabilitation for over 15 years. He has a master's degree in psychiatric counseling from the University of Nebraska.

Welcome, Mr. West.

**STATEMENT OF WILLIAM A. WEST, EXECUTIVE DIRECTOR,
ASSOCIATION FOR RETARDED CITIZENS, HARRISBURG, PA.**

Mr. WEST. Thank you, Mr. Chairman.

I would like to ask that the written comments be included.

Mr. HORTON. We will include your entire statement in the record if you would like to summarize it.

Mr. WEST. Yes; after hearing the testimony and questions and all during the entire day today I would like to make a few points I had not put in the written testimony.

One is that if these regulations were currently in effect the vast majority of the folks attending this meeting today would not be allowed to testify.

Another is that if these regulations were currently in effect, nonprofit organizations would have been unable to have informed our congressional leaders as to the impacts of the administration in trying to deregulate Public Law 94-142, Education for All Handicapped Children Act, which was attempted this past year.

We would also like to point out that if these regulations were in effect that the role of associations for retarded citizens throughout the United States in trying to help mentally retarded children become mainstreamed into the public schools, even to assist a parent in going through an individualized educational plan process would probably not be allowed when that involved advocating for them with local school districts.

We would not be allowed to go to bat for a person who is in a large State public institution.

We would have today probably well over 300,000 individuals in large warehousing public institutions for the mentally retarded instead of the under 150,000 we currently have, which has been primarily a result of the role of the Association for Retarded Citizens since the late 1940's in trying to show our society that there are better ways of serving handicapped citizens.

The group we represent, the 6 million mentally retarded persons in the United States, is a group which by and large cannot represent themselves. We have to be an advocacy organization.

We have been their advocate for some 34 years. And as a result of that advocacy role we have not only enabled the handicapped individuals to become more incorporated into society, we have also saved society untold millions of dollars.

Mr. HORTON. What you are saying is that you would be unable to continue in operation under your present structure if this OMB proposal were adopted?

Mr. WEST. Yes, sir, that is absolutely true.

Mr. HORTON. I guess you are concerned about the new one, too, are you not?

Mr. WEST. Oh, yes; we have been concerned about the fact that even in the field of mental retardation a lot of people don't know what the potential or capabilities of the people with mental retardation are.

Mr. HORTON. You probably couldn't be on a TV program to try to raise money for them?

Mr. WEST. Probably could not, probably could not.

Mr. HORTON. I have been on those.

Mr. WEST. The interesting thing is the cost that would be involved. In Pennsylvania, at least, the cost of institutionalizing a mentally retarded person runs about \$50,000 per year per person. The Community Services on the other hand in Pennsylvania are averaging a little over \$4,000 per person.

What we are trying to say is there are better ways of doing things and the best way to learn how to do things is to utilize the voice of those advocates we have been trying to represent the handicapped kids for the past 30-plus years.

By imposing these kinds of regulations you prevent Congress from hearing the voice of the best advocates available and you prevent us from being able to represent the rights and interests of handicapped people throughout the country.

We would urge Congress—first of all we urge the Office of Management and Budget—to recognize they have made a terrible mistake and throw these out the window.

I am not even sure they need to go back to the drawing board. I think first they ought to consult with some of the organizations that are so drastically affected.

Second, I would urge Congress to roundly reject this terribly destructive proposed regulation.

I very much appreciate the tone and tenor of what has been going on today. Thank you very much, Mr. Chairman.

Mr. HORTON. Thank you very much, Mr. West. Your statement is an excellent one and certainly points out what the problems are.

We appreciate your being here and waiting so long to come before the committee. Thank you very much.

[Mr. West's prepared statement follows:]

TESTIMONY PRESENTED BY: W. A. WEST, EXECUTIVE DIRECTOR
ASSOCIATION FOR RETARDED CITIZENS, PENNSYLVANIA

They were quietly tucked in the hindmost section of the January 24 FEDERAL REGISTER innocuously labeled "Cost Principles for Non-profit Organizations." If it weren't for the inquisitive nature of veteran reporters and the suspicions of non-profit staffers, the most far-reaching damaging regulations of this Administration may have been passed over.

Instead non-profit groups are asking the Office of Management and Budget to withdraw these damaging rules.

The regulations are very broad, but the basis is this - non profit organizations receiving full or partial federal funding will be prohibited from participating in what is termed "political advocacy." The definition runs rampantly through the gamut of advocacy activities, from entering a court case as a "friend of the court" to contacting a legislator.

I question whether the OMB can limit federally funded groups' access to the court system by prohibiting them to enter court cases as an amicus curiae. This seems an obvious violation of the U.S. Constitution. Thomas Jefferson never mentioned that access to the court system was tied to a funding source.

The Office of Management and Budget justifies this effort to squelch the voice of organizations representing the poor, elderly and the handicapped by claiming it is protecting the first amendment rights of the public. In actuality, these rules, if enacted would expand the government's control over the activities of private, federally funded non-profit organizations, especially small ones. In the end, everyone's rights would be violated.

Two major points emerge from the regulations. First, they would expand tremendously the definition of "political activities" from the current concern with legislation and the electoral process to any decision made by governments or officials.

Secondly, they would allow large, wealthy organizations to establish a separate office and to maintain separate staff and facilities so that they could continue their "political advocacy" while they continue to receive those precious federal dollars.

Thus, the new regulations set a double standard on lobbying. Only non-profit organizations with plentiful financial resources to establish a separate office and staff would be permitted to engage in political advocacy. Poor non-profits would be prohibited from advocacy even with their private resources.

Under these guidelines federally funded non-profit organizations would be banned from talking to their legislator, calling their own funding resources in the administrative branch of state and local government, and entering court as a "friend of the court." Amazingly enough non-profits would be prohibited from commenting on regulations such as these. As the Association for Retarded Citizens, Pennsylvania we are constantly lending our expertise to the Pennsylvania Welfare Department in need of help in drafting regulations that affect various aspects of retarded citizens' lives. These regs would eliminate our expert voice.

Congress has already established limitations on lobbying by non-profit organizations through the Internal Revenue Code and the Crimes Code, as well as in specific provisions of many enabling laws. By undertaking major, substantial, far-reaching changes through administrative policy, OMB has enacted substantive legislation as part of an administrative circular governing cost accounting principles. This is a usurpation of the Congressional legislative authority which may go well beyond the scope of OMB's authority.

I hear the wheels of this Administration clicking, saying either take the money and be quiet or give it up and go it on your own with private money. In the past few years the economy has made the private dollar a source of continual competition. Groups that are supposed to be helping the poor and needy find themselves pounding the pavement looking for money instead of performing the job they set out to do in the first place.

The Administration repeatedly asks the private sector to take on the responsibility of serving those in need at much less cost to the taxpayer, and private non-profits can save the government millions of dollars by matching federal grant monies with privately raised funds. But this effort to cut-off funds if a group is involved in political advocacy will only foster a further reduction in service and a greater dependency on government programs.

Bureaucrats and legislators need to hear from non-profit organizations, whether they receive federal funds or not. To eliminate the voice of groups representing retarded citizens, disabled people or the elderly just because they receive federal dollars is disgraceful.

Don't these groups have a right to represent their constituencies? Wealthy non-profits will continue to do so; they'll just move their political advocacy efforts across the street or into another section of the building at a hefty cost to the government and their contributors.

The public should be ecstatic that groups like the ARC are using their money to watch the government; to make sure that the legislative and the administrative branches are doing what the public has mandated them to do. This is a fundamental principle of our democracy.

It appears that only the wealthy will be permitted to represent their special interests in the halls of our legislatures if these regs are enacted. This will create a land of the elite -- forgetting those at the bottom of the social strata too poor or powerless to perform "political advocacy" on their own.

The ARC is 13,000 members strong and has local chapter affiliates in 55 counties across Pennsylvania. Many local ARC's receive federal dollars which will jeopardize their ability to work with their local legislators if these regulations are enacted. One of our fundamental principles is assuring through the governmental process that mentally retarded people are served and served well. We must be able to assure that they get their fair share of the federal, state and local dollars spent for service provision. We can't do that if OMB ties our hands. Without the ARC's advocacy efforts the rights of retarded citizens will be forsaken in the political process.

I hope that Congress sees the inherent danger in these OMB regulations and will stop this move to cut certain groups out of our political process.

Mr. HORTON. The next witness is Mr. A. G. W. Biddle, president of the Computer & Communications Industry Association, which he cofounded in 1972. He is a graduate of the U.S. Military Academy, class of 1952.

Following service in Korea, he worked in the private sector as an operations research analyst, a management consultant, director of diversification for an aerospace company, vice president of planning for a toy manufacturer, and founder and president of a west coast management consultant firm.

We are glad to see you again, Mr. Biddle.

STATEMENT OF A. G. W. BIDDLE, PRESIDENT, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Mr. BIDDLE. It is always a pleasure to be back.

I appreciate the chance to come before you today. As you know from past exposure to our association, CCIA is an association of chief executives of some 70 companies engaged in the manufacture of computer and communications-related hardware and software.

I find it ironic that last week Assistant Attorney General Baxter suggested that our members should not talk to each other without tape recorders and now Mr. Stockman tells us that they can't belong to a trade association and do business with the Government. Something strange seems to be happening over at the other end of Pennsylvania Avenue.

The principal purpose of the association was and is to monitor and report on developments in regulatory and legislative areas affecting our industry, and to provide our members with a means of expressing their collective views on those developments.

We have been active participants in successful efforts to modernize our Nation's antitrust laws, increase the efficiency and fairness of Federal ADP procurement, introduce competition into the field of telecommunications, roll back capital gains taxes in order to restore entrepreneurialism to the U.S. economy, and expand the level of exports of our industry's goods and services.

Only the largest of U.S. corporations can afford to maintain a full-time Washington presence. For the smaller companies, membership in their industry's trade association provides the eyes, ears, and voice that they require in order to have a say in the myriad regulatory and legislative decisions that affect their companies, their shareholders, and their employees.

As president of the CCIA my job and that of my staff is political advocacy for a very large and important sector of American industry. And contrary to comments of the administration, I am not ashamed the least bit about my responsibility to speak out in the political arena.

I have reviewed OMB's proposed revision to rules governing the activities of nonprofit corporations such as ours, and I am alarmed.

One of my member companies has a division that engages in extensive advanced development work under various Government contracts. Another of the divisions is in the data processing equipment business, sells to the Government under Federal supply schedules and competitive bid procedures, and belongs to our association.

If the president of the parent company were to testify before this committee about the data processing industry, would the president's salary, expenses and associated overhead be disallowed from the other division's Government contract?

Would his senior vice president of finance's salary and associated overhead be disallowed for talking to me for 15 minutes on the phone about this testimony?

If the president of the parent company participated in a meeting of the association that his nondefense contract division belonged to, would his salary and overhead allocation be disallowed?

The vast majority of our member companies sell to the Federal Government under schedules or through competitive bidding.

What prevents an auditor from asserting that the contract price includes some allocation of our association's dues and should therefore be disallowed in toto? That the president or a vice president of the company testified on behalf of the association and his salary and associated expenses should be disallowed?

Are the disallowed salary and associated expenses for the day he testified, the week, the year, or the duration of the contract?

A member company invites a Member of Congress to address the company's employees in the company's cafeteria. Is the company attempting to influence a Federal election? Is the company guilty of affecting the opinions of the general public or any segment thereof? Are the salaries of all individuals who had any involvement in inviting, greeting, or introducing the Congressman disallowed? Are the costs associated with the company's plant disallowed because the company cafeteria constitutes more than 5 percent of the usable space in the plant?

Perhaps some may view these as extreme examples. My point is simply this: OMB Circular A-122 if adopted in any way faintly approaching its present form and thrust will stifle the extremely important flow of information and ideas between our Nation's policymakers and its industrial leadership.

I have spent the last 10 years of my working career developing an awareness on the part of our member company executives of their responsibility to participate in the political process and to make their knowledge and expertise freely available to regulators and legislators to the benefit of our Nation.

Slowly and painfully I have caused them to start PAC's or to contribute to ours. Circular A-122 will lead corporate counsel and corporate financial executives to advise against continuation of these activities, or, in the alternative, ending any further sales to the Government.

In conclusion, Circular A-122 is ill conceived, vaguely drafted, and an administrative nightmare. To avoid the possibility of disallowance on significant cost items or the threat of debarment or suspension, all companies who do business with the Government are motivated to withdraw from their trade associations, disband their PAC's, cease presenting their views to the FCC, SEC, and, finally, to avoid all contact with any other regulatory or legislative personnel at the Federal, State, or local level that did not result from a specific written request or invitation.

I would hope that the members of this committee, from both sides of the aisle, will make it known to the administration that

OMB Circular A-122 should not only be withdrawn from consideration but that the premises underlying it should also be completely reconsidered.

I think our country is having enough trouble maintaining our world leadership in high technology without severing all communications between the private sector high technology community and our Nation's policymakers.

Thank you. I would be happy to entertain any questions you might have.

Mr. BROOKS. Thank you very much, Jack. It is a pleasure to have you here.

Mr. BIDDLE. Nice to be on the majority side for a change, sir.

Mr. BROOKS. Yes. That's right.

Does your organization have purely informational contact with Government agencies that might be curtailed by the proposed OMB regulations?

Mr. BIDDLE. Since our association is 100 percent dues funded it is my belief that just promulgation of this circular will cause many members to reconsider or their lawyers to counsel against association membership.

It is not unlike the impact that the prudent man rule in ERISA had on institutional investment in small companies in this country. They dried up because the lawyers were scared to death to encourage investment in a less than Fortune 500 sized company. So, yes, it will have a very stifling effect on our informational role.

I didn't get a letter inviting me to this hearing. This may be my last hearing if this thing is passed.

Mr. BROOKS. I hope not. I hope not.

Mr. BIDDLE. We have a lot of fun with OMB at times.

Mr. HORTON. I was thinking as you are talking, it will probably do away with the PAC's, too.

Mr. BIDDLE. It would.

Mr. HORTON. As a matter of fact, a lot of people would like to do away with them. Maybe this is the way to do it.

Don't answer that question.

Mr. BROOKS. Very good testimony.

Thank you.

John Charles Houston of the Fairness Committee Against Tax Funded Politics, the only witness other than OMB in favor of this proposal, called in and said he was unable to testify on account of illness. I hope that is not insignificant.

[Note: Mr. Houston's statement appears in the appendix.]

Mr. BROOKS. Our next witness is Mr. Robert T. Thompson, chairman of the board of directors of the U.S. Chamber of Commerce. Mr. Thompson, the senior partner in the Greenville, S.C., law firm of Thompson, Mann, and Hutson, a bosom friend of Senator Strom Thurmond—

Mr. THOMPSON. How did you know that?

Mr. BROOKS. He lives two doors away.

He was chosen chairman of the chamber's board this past January to succeed Paul Thayer when he joined the Reagan administration. He is a graduate of Emory University and the Emory Law School.

Mr. Thompson is accompanied today by Christine A. Russell, legislative counsel of the Small Business Center of the U.S. Chamber of Commerce, and by J. H. Joseph, vice president of domestic policy, U.S. Chamber of Commerce.

We are delighted to have you here and you can put all of your statement in the record as submitted and make any comments you so desire.

STATEMENT OF ROBERT T. THOMPSON, CHAIRMAN, BOARD OF DIRECTORS, U.S. CHAMBER OF COMMERCE, ACCOMPANIED BY CHRISTINE A. RUSSELL, LEGISLATIVE COUNSEL, SMALL BUSINESS CENTER, AND J. H. JOSEPH, VICE PRESIDENT, DOMESTIC POLICY

Mr. THOMPSON. Thank you, Mr. Chairman.

I would like to submit the entire statement for the record and I will summarize the statement if that is agreeable with the Chair.

Mr. BROOKS. Without objection, it is so ordered.

The gentleman is recognized.

Mr. THOMPSON. Mr. Chairman, Mr. Horton, my purpose today is to express the chamber's opposition to OMB's proposed changes to Circular A-122, "Cost Principles for Non-profit Organizations."

I asked to come here and testify today to emphasize by virtue of the position that I hold as chairman of the U.S. Chamber of Commerce the importance that we attach to this issue and the significance that we see in what is being proposed by this rule.

On January 24, 1983, the Office of Management and Budget proposed changes to Circular A-122 that would disallow the cost of political advocacy in pricing procurement contracts and certain grants. Similar changes were simultaneously proposed for the Defense acquisition regulation, Federal procurement regulation, and National Aeronautics and Space Administration procurement regulation.

OMB's proposals have set off a flurry of controversy in all sectors of the country, and rightly so. These changes, if implemented, would drastically alter the day to day routine operations of countless Federal contractors, nonprofit organizations, and trade associations. They would impose costly and unnecessary burdens on all affected parties and would inhibit the free flow of information between these parties and all levels of government. In short, they are unnecessary, unworkable, and very probably unconstitutional.

OMB's stated purpose in proposing these changes is to insure that Federal dollars are not used, directly or indirectly, for political advocacy. However, OMB offers absolutely no evidence that current law, regulations and policy guidelines do not address these concerns adequately.

The Federal procurement regulation currently disallows costs of lobbying. The Internal Revenue Code denies deductions for lobbying expenses. OMB Circular A-122 adequately prevents misallocation of costs under a Government grant or contract, whether or not these other costs involve political advocacy.

Yet OMB's proposals ignore existing safeguards entirely. In fact they go far beyond these established principles into entirely new universes of political activity.

Perhaps the most alarming element in OMB's proposals is a sweeping definition of political advocacy that covers virtually any contact with government except contacts relating specifically to a Federal grant or contract.

This includes activities designed to influence any governmental decision, on administrative as well as legislative matters, by communication with any member or employee of a legislative body or with any government official or employee who may participate in the decisionmaking process.

The new regulations would encompass activities at all levels of government, Federal, State, and local, and with all branches, legislative, executive and judicial.

What is more, dues to trade associations or other organizations that acknowledge that they engage in political advocacy activities, however minor in scope, would be disallowed by the OMB proposals.

For most groups it would be difficult, at best, to separate normal activities from OMB's version of political advocacy. Accordingly, nongovernment funds and organization uses for political advocacy would be jeopardized since government contact at any level would run the risk of being labeled advocacy by OMB.

In fact, OMB's definition of political advocacy encompasses the most important contacts between the private and public sectors, the routine exchange of information essential to keeping government in touch with those it must govern, thus rendering both sides less effective.

Furthermore, these restrictions would not be limited to that portion of activities related to political advocacy but would extend to those activities in their entirety.

Currently restrictions on lobbying activities by Federal contractors generally apply only to that portion of the contractors' activities allocable to lobbying.

Employees, equipment or facilities that are used for contract activities can also be used for lobbying purposes, provided that the cost of such lobbying is paid from non-Federal funds. OMB's proposals would drastically inhibit this practice.

The proposals require physical separation of personnel and equipment used in program activities and advocacy activities, a process that would be burdensome and impractical.

OMB's proposal that businesses and organizations segregate and consolidate these activities into a single office is totally unrealistic. For small businesses, which is the bulk of the U.S. Chamber of Commerce, I might add, it would be impossible; for large companies, impractical; for government, counterproductive. The result would be a more remote and less informed bureaucracy on all levels. For small businesses the awesome possibility of debarment is also included in this proposal.

The proposed regulations discriminatorily segregate and penalize a particular segment of free speech, political advocacy. They explicitly permit certain types of expression, such as nonpartisan studies and some types of litigation, and even permit some forms of political advocacy.

The proposals discriminate in favor of unions by granting a special exemption for union dues. Required membership in any other

political advocacy organizations would invoke total disallowance of the salaries involved but membership in unions does not invoke this disallowance.

Small businesses that receive Federal research and development funds would also be discriminated against under the OMB proposals. Universities, strong competitors for the limited Federal research funds available, are exempted from the proposals, while small businesses would be compelled to comply.

The regulations are also impermissibly vague. They do not define what constitutes attempting to influence an election or a governmental decision. The regulations do not explain how to recognize a Government employee who may participate in the decisionmaking process. The regulations do not define the sorts of nonpartisan studies of which they approve nor what constitutes technical advice or assistance that is exempt from penalty when solicited in writing.

Further, they do not define the sorts of ministerial or nonmaterial political activities that need not be penalized.

The proposals would infringe on the guarantees of the first amendment by precluding allocation of expenses, which would penalize exercise of freedom of expression and petition; discriminating, by exempting labor union dues and by restricting one category of free speech, activities defined as political advocacy, while allowing others; and imposing broad, vague, and unjustified requirements on certain sectors of society.

By denying reimbursement for costs of nonpolitical activities if those costs are attributable to employees, equipment or facilities also utilized in lobbying activities or political advocacy, as broadly defined, the Government proposes to levy an unconstitutional condition on contractors' rights to receive funds to which they are entitled by law.

Congress has long adopted programs calling for grants and contracts and, absent specific prohibitions, grantees and contractors have been allowed to engage in vigorous advocacy outside of their Government time. The system has worked with very little abuse and is constitutionally sound.

It is not OMB's responsibility to invoke broad and stringent requirements to solve a problem not acknowledged by Congress or the Supreme Court. Certainly it is not within OMB's authority to directly contradict these bodies, as would the proposed revision's requirements.

Under the current OMB Circular A-122 if a grantee or Federal contractor accepts Federal dollars and improperly allocates costs related to nonproject activities, Federal agencies have ample authority to withhold reimbursement.

The circular is based on sound accounting principles which, if followed by the granting agency, insure that no Federal dollars improperly flow to private activities. It would be a stunning intrusion into the speech and privacy rights of recipients to press further.

Finally, if OMB's proposed changes take effect, much more than the constitutional rights of the contractors and grantees is at stake. A democracy is richer if it can allow and even encourage citizens to join together to promote their interests.

OMB's proposed changes, however, seek to inhibit these activities. If they are implemented, all of us will be the poorer.

Thank you very much for allowing us to make our statement to this committee.

[Mr. Thompson's prepared statement follows:]

STATEMENT
before the
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
of the
GOVERNMENT OPERATIONS COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Robert T. Thompson

I am Robert T. Thompson, senior partner, Thompson, Mann and Hutson, and Chairman of the Board of the U.S. Chamber of Commerce. I am accompanied by Jeffrey H. Joseph, vice president, Domestic Policy, and Christine A. Russell, legislative counsel, Center for Small Business. My purpose today is to express the Chamber's opposition to OMB's proposed changes to Circular A-122, "Cost Principles for Nonprofit Organizations."

The Chamber of Commerce of the United States is the largest federation of business and professional organizations in the world, and is the principal spokesman for the American business community. The U.S. Chamber represents more than 237,000 members, of which more than 233,000 are business firms, more than 2,700 are state and local chambers of commerce and more than 1,200 are trade and professional associations.

More than 90 percent of the Chamber's members are small business firms having fewer than 100 employees. Yet, virtually all of the nation's largest industrial and business concerns are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

On January 24, 1983, the Office of Management and Budget proposed changes to Circular A-122 that would disallow the cost of "political advocacy" in pricing procurement contracts and certain grants. Similar changes were simultaneously proposed for the Defense Acquisition Regulation, Federal Procurement Regulation, and National Aeronautics and Space Administration Procurement Regulation.

OMB's proposals have set off a flurry of controversy in all sectors of the country -- and rightly so. These changes, if implemented, would drastically alter the day-to-day, routine operations of countless federal contractors, nonprofit organizations, and trade associations. They would impose costly and unnecessary burdens on all affected parties, and would inhibit the free flow of information between these parties and all levels of government. In short, they are unnecessary, unworkable and very probably unconstitutional.

A-122 CHANGES ARE NOT NEEDED

OMB's stated purpose in proposing these changes is "to ensure that federal dollars are not used, directly or indirectly, for political advocacy." According to the agency, these changes are needed to ensure that:

- 1) Government does not appear to endorse the political views of the organizations it funds;
- 2) Government does not induce recipients of federal funds to conform their behavior to government desires; and

3) Taxpayers are not required to contribute to the support of an ideological cause they may oppose.

However, OMB offers absolutely no evidence that current law, regulations and policy guidelines do not address these concerns adequately.

The Federal Procurement Regulation currently disallows costs of lobbying. The Internal Revenue Code denies deductions for "lobbying" expenses. And OMB Circular A-122 adequately prevents misallocation of costs under a government grant or contract, whether or not these other costs involve political advocacy.

Yet, OMB's proposals ignore existing safeguards entirely. In fact, they go far beyond these established principles into entirely new universes of political activity.

POLITICAL ADVOCACY DEFINITION UNREASONABLY BROAD

Perhaps the most alarming element in OMB's proposals is a sweeping definition of political advocacy that covers virtually any contact with government except contacts relating specifically to a federal grant or contract. This includes activities designed to influence any governmental decision, on administrative as well as legislative matters, by communication with any member or employee of a legislative body, or with any government official or employee who may participate in the decisionmaking process.

The new regulations would encompass activities at all levels of government -- federal, state and local -- and with all branches -- legislative, executive and judicial -- and public discussions (other than membership in a labor union).

What's more, dues to trade associations or other organizations that acknowledge that they engage in political advocacy activities, however minor in scope, would be disallowed by the OMB proposals.

The proposed changes have serious, and potentially devastating, implications for corporations which sponsor separate segregated funds, that is, political action committees (PACs). This runs contrary to the intent of the Federal Election Campaign Act of 1971 (FECA), written with the deliberate object of creating legitimate avenues of interest group participation in the electoral process.

In the 1974 Amendments to FECA, Congress reinforced its intent by specifically permitting government contractors to sponsor PACs. OMB's proposals contravene this clearly stated congressional intent by placing unwarranted administrative burdens on government contractors with PACs.

THE PROPOSALS ARE UNWORKABLE

For most groups, it would be difficult, at best, to separate normal activities from OMB's vision of "political advocacy." Accordingly, non-government funds an organization uses for political advocacy would be jeopardized, since government contact at any level would run the risk of being labeled "advocacy" by OMB.

In fact, OMB's definition of "political advocacy" encompasses the most important contacts between the private and public sectors -- the routine exchange of information essential to keeping government in touch with those it must govern -- thus rendering both sides less effective.

Furthermore, these restrictions would not be limited to that portion of activities related to "political advocacy," but would extend to those activities in their entirety. Currently, restrictions on lobbying by federal contractors generally apply only to that portion of the contractors' activities allocable to lobbying. Employees, equipment or facilities that are used for contract activities can also be used for lobbying purposes, provided that the cost of such lobbying is paid from nonfederal funds. OMB's proposals would drastically inhibit this practice.

For example, if an individual were to write to a local government official on behalf of a company under federal contract, the entire cost of his or her salary could be disallowed under the proposal, as could the costs of a photocopy machine used to reproduce the letter, and the postage machine that stamped the letter. Even though the so-called "political" activity took up a small percentage of employee and equipment time, the entire costs could be disallowed.

The proposals require physical separation of personnel and equipment used in program activities and advocacy activities -- a process that would be burdensome and impractical. They would force most major defense contractors and many nonprofits to move their government relations units into separate offices, with separate office equipment and separate clerical staffs.

For many, this division would prove logistically and economically infeasible. Unable to comply with the requirement, companies and organizations would be faced with the choice of rejecting federal funds and contracts or abstaining from any of the broad range of activities covered by OMB's definition of political advocacy. The effect would be to chill the perfectly legal dialogues and communications that are essential to sound governmental processes.

The business community and all levels of government -- federal, state and local -- currently communicate on a continuing basis about a vast array of concerns. Government is better for these interchanges. In fact, in a democratic society, they are essential.

OMB's proposal that businesses and organizations segregate and consolidate these activities into a single office is unrealistic. For small businesses, it would be impossible; for large companies, impractical; for government, counterproductive. The result would be a more remote and less informed bureaucracy on all levels.

OMB'S PROPOSALS ARE DISCRIMINATORY AND VAGUE

The proposed regulations discriminatorily segregate and penalize a particular segment of free speech -- "political advocacy." They explicitly permit certain types of expression, such as "nonpartisan" studies and some types of litigation, and even permit some forms of "political advocacy."

The proposals discriminate in favor of unions by granting a special exemption for union dues. Required membership in any other "political advocacy" organizations would invoke total disallowance of the salaries involved, but membership in unions does not invoke this disallowance. Further, the regulations would permit provision of "advice or assistance" to a governmental body in some circumstances, but not in others. It sometimes would be permissible to attempt to influence public opinion as long as the person doing so is not ultimately "attempting to influence government decisions."

Small businesses that receive federal research and development funds would also be discriminated against under the OMB proposals. Universities, strong competitors for the limited federal research funds available, are exempted from the proposals, while small businesses would be compelled to comply.

The regulations are also impermissibly vague. They do not define what constitutes "attempting to influence" an election or a governmental decision. They prohibit any attempt to influence the government by affecting public opinion but do not inform us of the circumstances in which an "attempt to affect" public opinion will be regarded as "attempting to influence" the government. The regulations do not explain how to recognize a government employee who "may participate in the decisionmaking process" or when communication with such an entity will constitute "attempting to influence." The regulations do not define the sorts of "nonpartisan" studies of which they approve, nor what constitutes "technical" advice or assistance that is exempt from penalty when solicited in writing. Further, they do not define the sorts of "ministerial" or "non-material" political activities that need not be penalized.

THE PROPOSED REGULATIONS ARE UNCONSTITUTIONAL

The proposals, which would have a chilling effect on freedom of expression and petition, would infringe on the guarantees of the First Amendment by:

- o Precluding allocation of expenses, which would penalize exercise of freedom of expression and petition;
- o Discriminating, by exempting labor union dues and by restricting one category of free speech -- activities defined as political advocacy -- while allowing others; and
- o Imposing broad, vague and unjustified requirements on certain sectors of society.

By denying reimbursement for costs of nonpolitical activities if those costs are attributable to employees, equipment or facilities also utilized in lobbying activities or political advocacy, as broadly defined, the government proposes to levy an unconstitutional condition on contractors' rights to receive funds to which they are entitled by law.

The Supreme Court has consistently held that the government may not deny a person a valuable government benefit "on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech." (*Branti v. Finkel*, 445 U.S. 507, 515 (1980) quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

Certainly, a broad restriction that denies contractor reimbursement for the costs of nonpolitical activities unless the contractor segregates facilities, equipment and personnel devoted to political activities not only serves no legitimate governmental interest or purpose, but raises fundamental constitutional issues as well.

Constitutional experts have extensively documented the questions raised by OMB's proposals. We would be happy to provide the Committee with this documentation if it so desires.

CONCLUSION

In a free society, government should rely primarily on its citizens to declare when free speech is threatened and needs remedial help.

Congress has long adopted programs calling for grants and contracts, and, absent specific prohibitions, grantees and contractors have been allowed to engage in vigorous advocacy outside of their government time. The system has worked with very little abuse and is constitutionally sound. It is not OMB's responsibility to invoke broad and stringent requirements to solve a problem not acknowledged by Congress or the Supreme Court. Certainly, it is not within OMB's authority to directly contradict these bodies, as would the proposed revisions' requirements.

Under the current OMB Circular A-122, if a grantee or federal contractor accepts federal dollars and improperly allocates costs related to non-project activities, federal agencies have ample authority to withhold reimbursement. The circular is based on sound accounting principles which, if followed by the granting agency, ensure that no federal dollars improperly flow to private activities. It would be a stunning intrusion into the speech and privacy rights of recipients to press further.

Finally, if OMB's proposed changes take effect, much more than the constitutional rights of the contractors and grantees is at stake. Lost opportunities will be the greatest casualty. A democracy is richer if it can allow and even encourage citizens to join together to promote their common interests. As long as the legal limits on lobbying are observed, organizations ought to be able to use their privately raised dollars to engage in other kinds of advocacy for themselves and their clients. If that advocacy brings criticism of a local school board or the United States Senate, no one is the poorer. In fact, through its exercise of freedom of expression, the entire country is enriched.

OMB's proposed changes, however, seek to inhibit these activities. If they are implemented, all of us will be the poorer.

Mr. BROOKS. Thank you very much for a fine statement.

I have one question. The OMB circular would prohibit contractors or grantees from contributing money, including dues, to any organization that had political advocacy as a substantial organizational purpose, or that spent \$100,000 or more on political advocacy. Would this provision disqualify some of your members from belonging to your association?

Mr. THOMPSON. I think possibly it would. I am not prepared to say that it would totally disqualify them from belonging. I think it would certainly diminish their ability to participate in our organization. In some instances it possibly would disqualify companies.

To be perfectly candid with you, I think I would have to say surely there would be ways you could segregate activities, funds, and dues so you could continue to operate. But it would definitely hamper an organization such as ours and conceivably, let's say through the cautious advice of legal counsel, there would be many, many Government contractors who would see fit not to belong to trade associations such as the U.S. Chamber of Commerce.

Mr. BROOKS. There are more than nine ways, you think, to skin a cat.

Mr. THOMPSON. Yes, sir.

Mr. BROOKS. More than nine.

Mr. THOMPSON. I would say this would appear to be No. 10.

Mr. BROOKS. No. 10, a new way.

Mr. THOMPSON. Yes, sir.

Mr. BROOKS. I believe you can do it. I believe you can do it.

Mr. THOMPSON. I am not willing to say we would go out of business. I think some organizations might, but we would find a way to survive, I would hope.

Mr. BROOKS. You have flexibility.

Mr. THOMPSON. It would be for—

Mr. BROOKS. It would be more difficult for small organizations.

Mr. THOMPSON. I think small organizations would be put in jeopardy of their existence.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you very much, Mr. Chairman.

First of all I want to thank you for coming, Mr. Thompson. I realize that as the chairman of the board of the chamber of commerce, your time is very valuable, and it is difficult for you to allocate that type of time.

This hearing has gone on for a long time. We do appreciate your patience.

I also want to tell you that we are happy that you did choose to be here personally, accompanied by two of your people from the chamber, because it does, I think, add importance and credibility to the position of the chamber. I would assume from what you have said you feel this OMB proposal is a very major intrusion into the affairs of the chamber of commerce and the people that you represent.

Mr. THOMPSON. Yes, sir. I would like to point out that the chamber, U.S. Chamber of Commerce, is a federation of trade associations and local chambers of commerce, and we represent them here today.

We would see it not only as an intrusion into our affairs directly but into the affairs of our many thousands of constituent members. That is the reason I am here, because we wanted to stress to you how important we consider this whole thing.

Mr. HORTON. One of my constituents, a close personal friend of mine, some years ago occupied the position that you occupy now. Mr. Shumway. You may know him.

Mr. THOMPSON. Very well. He is a very fine and distinguished gentleman.

Mr. Chairman and Mr. Horton, we have our annual dinner on May 1 this year and I want to personally extend an invitation to both of you to attend that dinner.

Mr. HORTON. Make a note of that, because I am going to be there.

Mr. BROOKS. Put that in the record. All right.

Mr. THOMPSON. We would be delighted to have both of you.

Mr. HORTON. I attended the one last year. They are always fine events.

I gather from what you have said you feel this is a very dangerous endeavor by the Office of Management and Budget.

I don't know whether you were here this morning when Mr. Wright of the Office of Management and Budget was talking about going back to the drawing boards and in 2 weeks coming out with something else. I was very impressed with your testimony because you indicated that you don't feel that anything further is needed. In other words, your testimony seems to indicate that the chamber feels that there are adequate safeguards now against the use of Government funds for lobbying.

Mr. THOMPSON. Yes. Absolutely.

Mr. HORTON. I assume that if OMB does come out with other proposals, the chamber will look them over very carefully, and I would hope that we could have the benefit of your views with regard to what they do propose.

I am a little bit concerned because I think that they have not talked with the people that they need to talk with, and they are scheduled to come out with something new in 2 weeks. I don't think 2 weeks is enough time to walk through the complex constitutional and other legal issues that they are going to have to go through in order to come out with some type of regulation.

Mr. THOMPSON. You can be certain we will scrutinize anything that does come out on this subject at any time. I will be surprised if they come back with anything, period. But I will certainly be surprised more if they come back in 2 weeks. We will certainly be here if there is the need for further hearings.

Mr. HORTON. Thank you very much. We appreciate your testimony.

Mr. THOMPSON. Thank you all.

Mr. BROOKS. Thank you all.

Our next witness this afternoon is Mr. John M. Toups, president and chief executive officer of Planning Research Corp. He is appearing today on behalf of the Professional Services Council.

Mr. Toups was named president of PRC in November of 1977 and chief executive officer the following January. He was the founder of the Toups Corp., a civil engineering firm that was acquired by

PRC in 1970. He holds a degree in civil engineering from the University of California at Berkeley and is a member of a number of professional engineering associations. Mr. Toups is accompanied by Bert Concklin, PRC's director of government relations.

Gentlemen, we are delighted to have you here. We would accept your statement for the record and you may make whatever comment you might want.

STATEMENT OF JOHN M. TOUPS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, PLANNING RESEARCH CORP., ON BEHALF OF PROFESSIONAL SERVICES COUNCIL, ACCOMPANIED BY BERT CONCKLIN, DIRECTOR, GOVERNMENT RELATIONS, PLANNING RESEARCH CORP.

Mr. TOUPS. First we want to thank the committee for the opportunity to present the views of the Professional Services Council here today. It is a trade association of firms that provide technical and professional services to both Government and the private sector. The primary purpose of the council is to promote the policy of Government reliance on the private sector for needed goods and services. In other words, the council seeks avoidance of Government competition with the private sector where the private sector is capable of providing what the Government needs.

I came here as a concerned member of this council to present its strong opposition to this OMB proposal. After hearing all of the testimony today I am not just concerned about it; I, too, am outraged. I really am.

Only now do I realize the full negative impact on the country and on my company that this proposal could have, or could have caused.

I realize that the proposal will not get implemented largely because of this committee's good work.

Mr. BROOKS. You shouldn't be so confident, Mr. Toups, that they are going to go back to the drafting board.

Mr. TOUPS. I heard all of that. We will be here.

Mr. BROOKS. We will all be back again.

Mr. TOUPS. Absolutely.

Mr. BROOKS. I don't think they want to deal with us anymore, but they may have to.

Mr. TOUPS. I am outraged at the lack of thought that the OMB gave to this proposal in the first place or, even worse, at what might be OMB's hidden agenda.

Let me personalize my concern by talking about the impact of the proposal, if adopted, on my company.

PRC is a professional services company with over 6,000 engineers, scientists, and other professional and technical people. We do about 330 million dollars' worth of business a year. About half of that is for the government, largely the Federal Government although we do some State and local government work, too. The other half of our business is with the private sector.

To properly serve any client one must understand its needs and its procedures and rules. In order to properly serve the Federal Government we must have a lot of interaction at all levels of the Government and with all of the branches.

We must deal with a wide variety of government regulations. We must routinely engage Federal, local, and State governments in both seeking and offering ideas on such matters as Federal procurement, program technical standards, taxation, trade policy, pension policy, SEC functions, health and safety, and a myriad of others.

We must also engage in the conventional buyer-seller relationship. Private-sector sellers do not communicate with government buyers only by choice. The multitude of government regulations that impact our government business make it mandatory that we understand, comply with and react to them effectively and quickly. This requires communications.

To facilitate this needed communication with the government we have a modest full-time government relations activity. It costs about \$300,000 a year, or about one-tenth of 1 percent of our total costs or total revenues.

And not all of this \$300,000 is for lobbying; a lot of it is other communications and liaison which are allowable costs under the present rules.

The proposed rules would probably make all of the \$300,000 unavailable, only about \$150,000 of that would be saved by the government because we only do about half of our work for the government. The other half of the \$300,000 in government relations expenditures is charged to the private sector work we do.

So we are only talking about—in our case, anyway—a very modest sum, I believe. Compare this \$150,000 with the impact that this regulation could have had on us.

For example, I serve at the request of the Secretary of the Treasury as the volunteer chairman of the U.S. payroll savings plan in the Washington metropolitan area. In that role last fall I contacted some Members of Congress to seek their support for the adoption of a variable interest rate for U.S. savings bonds, to make them more attractive savings instruments.

Under the proposed rules, as I understand them, this activity would have contaminated the rest of my cost—the rest of my salary—and this would have been disallowed.

I can assure you that this is substantially more than \$150,000 to which I first referred.

Let me give you a second example. Suppose that 100 of our 6,200 employees during the course of the year had some contact with State, local, or Federal Government on a political matter—something that would be interpreted under this rule as a political matter. If those people worked on government contracts their salaries would be disallowed.

The impact on us of those salaries being lost would represent somewhere between 25 and 50 percent of our total annual profits.

Let me give you a third example, which I think is outrageous. I don't think it was meant to be this way but a literal interpretation of the proposal would get you to this conclusion.

Our staff works in both the private and the public sector. In the private sector we are quite often hired as experts, advocates even, for a certain point of view. For example, we do a lot of work for the Federal Department of Transportation. Some of those engineers, on occasion, work for a private sector client like, say, a homeowners'

association in Fairfax County. An engineer may go down to the board of supervisors and represent the association on a traffic matter that is of concern to its members, to try to influence the decision of the board of supervisors.

As I understand these regulations, that traffic engineer's time spent working on DOT projects would be disallowed.

Now, if I am correct about the proposed regulations and if that occurred, it would bankrupt our company, which means we wouldn't do that. As a practical matter, in the long run it would mean we would have to separate our company into two parts, one part to work for the Federal Government and the other part to work in the private sector.

We could not continue to serve both the public and private sectors. That would be a very negative impact on this country.

There is an awful lot of technology transfer, a lot of other management concepts transferred back and forth. And to tell a private company that it cannot work for the Federal Government and still work in the private sector, which is what this really says—it would have that practical impact—I think is outrageous.

I believe that expresses my views, Mr. Chairman. I would conclude by saying that I don't think this proposed rule is needed, it is useless and it ought to just be abandoned. I respectfully ask that this committee use its influence to get the administration to drop the proposed rule.

Thank you.

[Mr. Toups' prepared statement follows:]

Statement of John M. Toups
Before the
House Government Operations Committee

INTRODUCTION

Good afternoon, Mr. Chairman and Members of the Committee:

I want to thank you for the opportunity to present the views of the Professional Services Council regarding the proposed new rules on the cost allowability of lobbying activities. I am here today representing the Professional Services Council. I am also the Board Chairman and President of Planning Research Corporation (PRC).

First, a word about the Professional Services Council. We are a trade association with membership deriving primarily from firms which provide technical and professional services to the public and private sector. The primary focus of the Professional Services Council is the promotion of the policy of government reliance on the private sector for needed goods and services--that is, avoidance of government competition with the private sector.

The PSC membership includes small businesses with sales under \$10M as well as large, diversified professional services companies with sales levels in excess of \$100M. As such, the PSC represents neither a small business nor a big business orientation but a blend of the interests of each as they pertain to the pursuit of the policy goal of government reliance on the private sector for commercial goods and services.

The firm which I head, PRC, has been in the professional and technical services business for 29 years, serving both the public and private sectors--currently business derives approximately 60 per cent government and 40 per cent private sector sources. In our history and through the moment, we provide an extremely broad range of technical and managerial services with hundreds of individual projects in existence at any given time. We have supported and served virtually all major and most minor agencies of government in functions ranging from design support of the Space Shuttle, to the design and construction management of U.S. Navy port facilities.

ISSUES

We are here today to convey our strongest opposition to a truly remarkable and unfortunate instance of a regulatory response which is out of all proportion to the apparent problem. The rules which the OMB and the DOD have proposed relative to "political advocacy" (a new euphemism for lobbying we believe?) are nothing less than stunning in their damage potential and arbitrary characteristics. What is at stake, ladies and gentlemen, is the survival of open and constructive communication between the public and the private sector--the type of communication which has often been instrumental in helping understand and solve our major social, economic and national security problems.

The architects of the proposed policy no doubt are well intended in their purpose. We believe they are seriously misdirected in two important respects:

- (1) Political Advocacy. A definition of political advocacy is proposed which goes far beyond any reasonable definition of what has been traditionally defined as lobbying--by the IRS, DOD, GSA and others.
- (2) Implementing Rules. The specific terms of how the new rules would be implemented are, charitably, extremely punitive in their design and effect.

THE POLITICAL ADVOCACY DEFINITION PROBLEM

The proposed rules are ostensibly an effort to impose additional regulatory controls on the reimbursement principles for lobbying expenses. We cannot discern any need for additional controls applicable to contractors in light of regulatory actions recently taken. I have in mind the most recent Defense Acquisition Regulation (DAR 76-39, Para. 15-205.51) issued in October 1982 by Secretary Weinberger, which imposes strong and specific limitations on lobbying cost reimbursement. Similarly, the current GSA regulation (FPR, Amendment 226) constrains cost reimbursement for lobbying.

Basically these instruments define lobbying as efforts to influence the content and direction of legislative action--typically through efforts to gain approval of weapon systems or social programs and influence budget levels. It is my strong impression that most companies fully comply with these regulations and anticipate that they will experience a certain degree of unallowable cost as the consequence of lobbying activities.

In addition to the standing regulations, there is a very real enforcement mechanism which most of us are well acquainted with. I refer to the Defense Contract Audit Agency personnel who aggressively audit our financial activities related to government contracts. I can assure you they are diligent in examining the allowability of our costs as they relate to lobbying activities.

The proposed rule changes apparently are motivated by a perception that the lobbying regulations are not adequate. In any case, the proposed rule makes an astonishing leap from the accepted definition of lobbying to something newly defined as "political advocacy." The proposed definition of political advocacy includes most routine forms of communication by contractor and non-profit organizations intended to have an impact on and add value to the quality of government policy making, decisions and on-going operations. Quoting from the proposed DAR, it defines as unallowable political advocacy

"attempting to influence governmental decisions through communication with any member of employee of a legislative body or with any government official or employee who may participate in the decision making process."

The range of prohibited interactions would include such fundamental transactions as petitioning the government for relief from a regulation (e.g., OSHA standards, pension regulations, food inspection procedures), recommending substantive improvements in program technical standards (flight safety, drug abuse, construction, financial disclosure), advocating changes before local governments in such areas as zoning, education, taxation and law enforcement.

A typical business system internal to a profit making company such as my own is, for better and for worse, heavily regulated and must routinely engage the government in a free flow of information and ideas across the regulatory interfaces in such areas as federal procurement, taxation, trade policy, pension policy, SEC functions, health and safety and many others.

The all encompassing breadth of the proposed definition of political advocacy would have a desolating effect on buyer-seller communication. It insults the tradition of mutual trust and problem-solving which has characterized the major and important joint public-private sector efforts of this country in national defense, in economic development, in space, in education, in health and many other areas of importance to our social and economic well-being as a nation.

IMPLEMENTING RULES ("Contamination Principle")

The fundamental flaws in the definition of what constitutes political advocacy are sufficient grounds in themselves for discontinuing the OMB/DOD rule making. To make matters much worse, the implementing rules are breathtaking in their arbitrary and punitive characteristics. The centerpiece of the implementing rules is the "contamination" principle which is, to say the least, innovative. Simply stated, any utilization of people, equipment or facilities for political advocacy contaminates the resource used.

This would mean that if I, in my corporate capacity, approached an agency executive or member of Congress to discuss a potential improvement, in perhaps, investment tax credits or government programs to stimulate technology, I would become contaminated; that is, the balance of my time which would be devoted to ongoing corporate internal management could not be paid for (as it is today in part) by funds flowing through government contracts.

The examples of this contamination notion are as numerous as they are ludicrous. In the equipment and facilities area, the use of a piece of reproduction equipment to produce one sheet of paper related to political advocacy would contaminate that equipment for reimbursement in connection with legitimate contract work. Under the proposed rules, the fact that I have sought to have an impact on your thinking on this issue would throw me into a contaminated category. Even the typewriter used to produce the paper from which I am reading could have no part of its costs allocated to government contracts for an entire year.

I can only conclude that the auditors of the proposal attempted an utterly tortured design to totally partition political advocacy activities from the policy, managerial, administrative, and ongoing operations of the corporation or nonprofit. This is an artificial separation in the extreme which would be virtually impossible to administer and ultimately very expensive to the government and society.

IMPLICATION FOR INDIVIDUAL ORGANIZATIONS

At this point I would like to give you some sense of the impact on individual corporations of the proposed rules. I cannot speak about the specific impact on the nonprofits but I believe they would be similar, except probably more severe because of the smaller size and financial limitations of those organizations.

Before proceeding to talk about direct financial impacts, I think it is important to make the point that the full and extensive range of communications between private sector sellers and government buyers are not elective in nature. They are a business-survival imperative arising from the need to understand, comply with, and react effectively and efficiently in the face of the multitude of government regulations which impact our business system. The dynamic, complex, and frequently inconsistent nature of federal regulatory systems does not allow us the luxury of a benign posture towards how the government conceptualizes and implements federal regulation. The costs of staying abreast of and anticipating and dealing effectively with regulation are in fact an internal cost of doing in our highly competitive system. That cost will and must be incurred and will ultimately be reflected in the prices of goods and services. Therefore, in the largest economic sense, we are not talking about saving money but rather what constitutes a reasonable approach to defining and assuring proper cost allocation related to lobbying.

With regard to specific financial impacts, the situation obviously will vary significantly from company to company. In the case of Planning Research Corporation, we have a relatively modest ongoing government relations activity, as do most of our competitors. In fact, the expense for this function constitutes less than 1/10th of 1 per cent of our annual sales. This simple arithmetic masks the deeper reality of how these proposed rules would impact operations like ours. If I very conservatively assume that in a given operating year 100 of our 6300 employees engaged (even for one hour) in some form of interaction with the government (which would be included in the proposed definition of political advocacy) a serious financial problem results. If these 100 individuals who normally work on government contracts were "contaminated," they could not be reimbursed for the work they perform in fulfillment of such contracts. This would occur very simply by an inability to absorb the direct costs, overhead and general and administrative expenses associated with these people, which in the case of 100 people, might amount to \$6M. This \$6M loss, in turn, would represent a bottom line erosion of our annual profit to a degree which in the view of our stockholders would make us a totally unsatisfactory company.

The obvious question is, given the hypothetical financial damage just described, why not simply stop interacting with the government. As I have indicated, that is simply not a practical option in a highly regulated economic system. As a footnote, I believe that the relative impact on small businesses would be proportionately worse, since they, like us, have an irreducible fixed cost of doing business with the government.

SUMMARY

Mr. Chairman, and members of the Committee, the Professional Services Council sincerely believes that the proposed rules are not worthy of continued development and that the rule making proceedings should be cancelled. They are destructive, arbitrary, and ultimately punitive. Their philosophic thrust and content is misdirected. I am reminded of current Secretary of State George Schultz' observation in a collection of essays related to business and public policy (edited by John T. Dunlop, Harvard University Press, 1980). Secretary Schultz observes that there is a central tension in our system between economic efficiency and political equity. He goes on (paraphrasing) to say that business is driven primarily by economic efficiency considerations and that government policy and regulatory action is driven by perceptions of political equity. He then underscores the importance and difficulty of balancing these often competing positions.

The issue we are discussing today is an unfortunate instance of chronic imbalance between on the one hand the business and nonprofit communities legitimate rights of access and communication, and on the other hand the government's obligation to regulate lobbying activities. I suggest to you that the proposal at hand would totally stack the deck in favor of the government. The people, who the government represents after all, would be the real losers.

Beyond the lack of merit of the proposal, I sincerely believe it is a regulatory initiative which would be extremely expensive, virtually impossible to administer, and would invite non-compliance because of its complex and arbitrary nature. Ex-Secretary of Labor John Dunlop addressed this latter point in an article (The Limits of Legal Compulsion, 27 Labor Law Journal 72):

"It should be a first principle (of regulatory design)
that no set of men are smart enough to write words about
which others cannot find holes when the stakes are high."

As I have indicated earlier in my testimony, the stakes are high in this instance because of the necessity to interact with government across multiple regulatory interaces.

The proposed rules do not advance the goals of responsive government, economy, and the best use of public and private sector resources to solve national problems. They are characterized by a closed approach to governing, and an utterly non-convincing body of evidence that a real problem exists.

I urge you to use your influence to prevail upon the Administration to cancel this unfortunate rule making proceeding.

Thank you for the privilege of participating as a witness before your Committee.

Mr. BROOKS. Thank you very much for a splendid statement. I enjoyed reading your prepared statement and I enjoyed the one that you just made. I think they both complement each other and are helpful.

Do you foresee a danger that this OMB proposal could give governmental agencies the power to pick and choose the views they hear on pending governmental decisions by soliciting opinions only from friendly organizations?

Mr. TOUPS. Absolutely. In fact, the example I gave on the savings bond thing; frankly, I was asked to do that by a member of the Treasury Department. Obviously the Treasury Department wanted that bill passed. I did, too. I think it was a good bill. But it clearly could be worked in that manner, that you would only be asked to participate in things that they wanted you to, no doubt about it.

Mr. BROOKS. Mr. Horton.

Mr. HORTON. Thank you, Mr. Chairman.

Mr. TOUPS. I was very impressed with your testimony and the sincerity of it. I sense that you came here excited to begin with, and the longer you sat here and the more you listened, the more excited you got.

Mr. TOUPS. I didn't come here excited. People that know me know that I don't normally get excited. I did not. I came here concerned. My staff had been telling me about this rule and I just couldn't believe the intent of it. I came here thinking there would be clarification. There wasn't.

I sat through the testimony this morning and I couldn't believe what I heard.

Mr. HORTON. That is what I said. My first reaction, when I read about the proposal up in Wayne County one night, after someone told me he couldn't talk with me any more because I am a Congressman, was the same as yours. I read the proposal that night and I was shocked.

I am glad we have had this hearing. I think your testimony is very helpful. I am concerned and hope that the message can get carried back to the Office of Management and Budget that this is not the way to solve the problem that they have mentioned.

I would assume from what you have said and what other people have said here that Federal funds dispensed through grants and contracts are generally not being used for lobbying purposes or anything unlawful. Are you saying that there may be abuses, but those abuses can be corrected other ways?

Mr. TOUPS. Yes.

Mr. HORTON. Kind of like throwing the baby out with the bath water.

Mr. TOUPS. Yes. The GAO statement, I think, was very sound. We have a good accounting staff. We have internal auditors, outside auditors, and resident full-time Federal Government auditors in our building. We have an audit committee composed of outsiders. We have a code of business practices. We are very explicit in following the rules and regulations of this Government.

Mr. HORTON. The narrow rules and regulations.

Mr. TOUPS. Absolutely, absolutely.

Mr. HORTON. And they are pretty stringent to begin with. Do you think the taxpayer is getting his dollar's worth under the present system without having to have that regulation?

Mr. TOUPS. Yes. Absolutely. No question.

Mr. BROOKS. You said you were concerned when you came in but not excited. But your statement said that these rules should be canceled, "They are destructive, arbitrary and ultimately punitive. Their philosophical thrust and content is misdirected."

You know, when he gets mad he really gets after them, doesn't he?

Thank you very much for presenting your views.

Our next witness is Peter F. McCloskey. Mr. McCloskey is president of the Electronic Industries Association, which represents the full spectrum of U.S. manufacturers in the electronics industry. Prior to joining EIA he was president of the Computer and Business Equipment Manufacturers Association and served as president and chairman of the board of a manufacturing company.

Mr. McCloskey received a B.A. degree from Holy Cross College and a law degree from Fordham University School of Law.

Mr. McCloskey is currently serving on the Peace Corps Advisory Council to which he was appointed by President Reagan.

STATEMENT OF PETER F. McCLOSKEY, PRESIDENT, ELECTRONIC INDUSTRIES ASSOCIATION, ACCOMPANIED BY ROBERT C. JOHNSON, CHAIRMAN, MULTIASSOCIATION TASK GROUP ON CIRCULAR A-122

Mr. McCLOSKEY. Thank you, Mr. Chairman. Accompanying me is Bob Johnson, the chairman and EIA representative to a multiassociation task group which is developing a response to OMB Circular A-122.

We are particularly pleased to offer our testimony. We have heard a lot of the testimony that has gone on earlier today. I would like to contribute to that testimony, and in particular, would commend the remarks just delivered by Mr. Touns.

In addition, Mr. Chairman, the multiassociation position statement which I referred to earlier is in preparation and will be furnished to this committee by the end of the week for further information.

I would like to summarize briefly our position. It is that the OMB proposal places an unjust and unreasonable burden on Government contractors and it must be withdrawn.

The policy and regulatory changes contravene existing administration policy and overreach and usurp congressional prerogatives and intent with regard to restrictions on political advocacy.

In addition, the vast expansion of the definition of political advocacy, coupled with the imposition of a contamination principle of disallowance of legitimate costs of doing business, will have the effect of restricting the flow of information which is vital to the decisionmaking processes of congressional and executive branch officials alike.

This contamination principle or test of political involvement is impractical in today's closely regulated business world. By attempting to impose a physical wall of separation between the activity of

political advocacy and the activity of performing a contract, they would inequitably benefit the Government and penalize contractors at the same time. This would occur because reimbursement would be denied for 100 percent of the work of an employee, 99 percent of whose time had been productively spent in support of a contract and 1 percent in political advocacy activities.

I would like to also say a few words about the provisions of the circular which impact associations. Trade associations provide a number of valuable services to the Government and the public, including the development of technical standards, performance of market studies and the holding of educational symposia.

The prohibition disallowing membership in associations engaged in any degree of political advocacy as a reimbursable cost would limit the ability of these groups to conduct such programs through the curtailment of industry participation.

In addition, it must be understood that if and when an association does engage in political advocacy activities it is done on a consensus basis, reflecting the views of either the whole membership or a significant segment thereof. Such a consensus process might mean that at times the views of a particular company could be contrary or even neutral or disinterested toward the position of the industry as a whole.

Therefore, the political advocacy activities of an association could be of little or no direct benefit to an individual member company.

As a matter of fact, a company may join EIA and contribute strictly to support technical, educational, or marketing programs.

It is for these reasons that I feel very, very strongly that the proposed policy and implementing regulations are unjustifiably burdensome, inconsistent with congressional intent and will cause financial and operational disruption which will far outweigh any benefit to be derived from their implementation.

We appreciate the tenor of the comments made today and we urge your support in seeing that these rules and regulations are not imposed on industry.

[Mr. McCloskey's prepared statement follows:]

STATEMENT

OF

PETER F. McCLOSKEY

ELECTRONIC INDUSTRIES ASSOCIATION

MR. CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE:

I AM PLEASED TO APPEAR BEFORE YOU TODAY TO PRESENT THE VIEWS OF THE ELECTRONIC INDUSTRIES ASSOCIATION ON OMB'S PROPOSED REVISION OF CIRCULAR A-122 AND THE ATTENDANT REGULATORY CHANGES. REPRESENTATIVES OF EIA ARE CURRENTLY WORKING IN COOPERATION WITH OTHER ASSOCIATIONS TO PREPARE FORMAL, WRITTEN COMMENTS IN RESPONSE TO THE OMB PROPOSALS; THESE COMMENTS WILL BE FINALIZED WITHIN THE WEEK AND WILL BE PROVIDED FOR YOUR CONSIDERATION. MY REMARKS THIS MORNING WILL ATTEMPT TO BRIEFLY SUMMARIZE SOME OF INDUSTRY'S PARAMOUNT CONCERNS ABOUT THE IMPLEMENTATION OF THESE REGULATIONS.

AFTER EXTENSIVE STUDY OF THE PROPOSED CHANGES, IT IS OUR CONSIDERED OPINION THAT THE OMB PROPOSAL PLACES AN UNJUST AND UNREASONABLE BURDEN ON GOVERNMENT CONTRACTORS, AND MUST BE WITHDRAWN.

THE POLICY AND REGULATORY CHANGES CONTRAVENE EXISTING ADMINISTRATION POLICY, AND OVERREACH AND USURP CONGRESSIONAL PREROGATIVES AND INTENT WITH REGARD TO RESTRICTIONS ON "POLITICAL ADVOCACY." IN ADDITION, THE VAST EXPANSION OF THE DEFINITION OF POLITICAL ADVOCACY, COUPLED WITH THE IMPOSITION OF A "CONTAMINATION" PRINCIPLE OF DISALLOWANCE OF LEGITIMATE COSTS OF DOING BUSINESS, WILL HAVE THE EFFECT OF RESTRICTING THE FLOW OF INFORMATION WHICH IS VITAL TO THE DECISION-MAKING PROCESS OF CONGRESSIONAL AND EXECUTIVE BRANCH OFFICIALS ALIKE.

IN ITS OWN PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM RELEASED IN FEBRUARY 1982, THE OFFICE OF MANAGEMENT AND BUDGET STATED ON PAGE 25:

"PRESENT COST PRINCIPLES WILL BE REVIEWED WITH THE OBJECTIVE OF ALLOWING ALL NORMAL AND NECESSARY COSTS OF DOING BUSINESS. THE COST PRINCIPLES WILL RECOGNIZE THAT THE DISALLOWANCE OF NECESSARY COSTS ERODES CONTRACTOR PROFITS. THIS IN TURN REDUCES COMPETITION. THE ONLY UNALLOWABLE COSTS SHOULD BE THOSE WHICH ARE AGAINST PUBLIC POLICY."

ARE ALL ACTIVITIES EMBRACED IN THE PROPOSED DEFINITION OF POLITICAL ADVOCACY CONTRARY TO PUBLIC POLICY? WE WOULD CONTEND THAT COMMUNICATIONS BETWEEN GOVERNMENT AND INDUSTRY ARE ESSENTIAL TO THE PROPER CONDUCT OF BUSINESS BY BOTH PARTIES, PARTICULARLY IN THE HIGHLY COMPLEX AND INCREASINGLY TECHNICAL SPHERE OF GOVERNMENT CONTRACTING. THUS, THE ANSWER TO THIS QUESTION MUST BE A RESOUNDING, "NO!"

THE PROPOSED REGULATIONS IMPOSE LIMITATIONS ON "LOBBYING AND RELATED ACTIVITIES WHICH GO WELL BEYOND THOSE DIRECTED BY CONGRESS. THE DOD APPROPRIATION ACT FOR FY 1983 - (PUBLIC LAWS 97-377 AND 97-796) HAS STATED THAT:

"NONE OF THE FUNDS MADE AVAILABLE BY THIS ACT SHALL BE USED IN ANY WAY, DIRECTLY OR INDIRECTLY, TO INFLUENCE CONGRESSIONAL ACTION ON ANY LEGISLATION OR APPROPRIATION MATTERS PENDING BEFORE CONGRESS."

THIS IS THE ONLY SPECIFIC RESTRICTION ON THE USE OF APPROPRIATED FUNDS TO HIRE ANYONE TO LOBBY THE CONGRESS, OR TO PROMOTE THE GENERAL PUBLIC'S ENGAGING IN GRASS ROOTS LOBBYING. IT IS CLEARLY IN CONSONANCE WITH INTERNAL REVENUE CODE RESTRICTIONS ON BUSINESS DEDUCTIONS FOR POLITICAL ADVOCACY ACTIVITIES. IN SECTION 162(E) OF THE REVENUE ACT OF 1962, CONGRESS RECOGNIZED THAT A BUSINESS MUST BE ABLE TO MONITOR LEGISLATIVE DEVELOPMENTS AND REGISTER ITS VIEWS IN ORDER TO FUNCTION EFFECTIVELY IN TODAY'S ECONOMY. THE ACT CREATED A SPECIFIC DEDUCTION FOR POLITICAL ADVOCACY, THEREBY ELIMINATING CONFUSION CAUSED BY EARLIER REGULATIONS WHICH SOUGHT TO DISTINGUISH BETWEEN REGULAR BUSINESS EXPENSES AND LEGISLATIVE ACTIVITIES.

FURTHER AND DEFINITIVE GUIDANCE ON LEGISLATIVE CONTROLS ON LOBBYING IS CONTAINED IN THE FEDERAL REGULATION OF LOBBYING ACT, 2 U.S.C., SECTION 261 ET. SEQ. (1946). THAT ACT DEFINED LOBBYING ACCORDING TO ITS CURRENT COMMONLY ACCEPTED MEANING, I.E., DIRECT COMMUNICATION WITH MEMBERS OF CONGRESS ON PENDING OR PROPOSED LEGISLATION.

THE CURRENT OMB PROPOSALS COMPLETELY OVERREACH THESE CLEAR EXPRESSIONS OF CONGRESSIONAL INTENT. THEY EXTEND THE DEFINITION OF POLITICAL ADVOCACY TO BAR PAYMENT FOR ANY CONTACT WITH RULE-MAKING OR POLICY MAKING PERSONNEL OF THE EXECUTIVE BRANCH AND STATE AND LOCAL GOVERNMENT ENTITIES. THEY WILL HAVE THE EFFECT OF USURPING CONGRESSIONAL PREROGATIVES

BY RESTRICTING THE FREE FLOW OF INFORMATION BETWEEN INDUSTRY AND GOVERNMENT. AND THEY WILL PLUNGE CONTRACTORS INTO THE ENVIRONMENT WHICH THEY FACED PRIOR TO THE 1962 REVENUE ACT, REQUIRING THEM TO UNDERTAKE THE BURDENSOME TASK OF DETERMINING WHAT CORPORATE RESOURCES CAN BE DEVOTED TO ANY FORM OF GOVERNMENT RELATIONS WITHOUT RISKING COMPLETE DISALLOWANCE OF THE COST OF THOSE RESOURCES UNDER FEDERAL CONTRACTS.

THIS REPUDIATION AND ALTERATION OF CONGRESSIONAL INTENT SHOULD ALONE REPRESENT A COMPELLING ENOUGH REASON FOR THE WITHDRAWAL OF THESE REGULATIONS. HOWEVER, THE PROPOSALS GO MUCH FURTHER IN THEIR ONEROUS EFFECTS ON THE GOVERNMENT CONTRACTING ENVIRONMENT. THEY WOULD ESTABLISH A "CONTAMINATION" (ALL OR NONE) TEST OF POLITICAL INVOLVEMENT WHICH IS IMPRACTICAL IN TODAY'S CLOSELY REGULATED BUSINESS WORLD. BY ATTEMPTING TO IMPOSE A PHYSICAL WALL OF SEPARATION BETWEEN THE ACTIVITIES OF POLITICAL ADVOCACY AND THE ACTIVITIES OF PERFORMING A CONTRACT, THEY WOULD INEQUITABLY BENEFIT THE GOVERNMENT AND PENALIZE CONTRACTORS AT THE SAME TIME.

THIS WOULD OCCUR BECAUSE REIMBURSEMENT WOULD BE DENIED FOR 100 PERCENT OF THE WORK OF AN EMPLOYEE, 99 PERCENT OF WHOSE TIME HAD BEEN PRODUCTIVELY SPENT IN SUPPORT OF A CONTRACT AND ONE PERCENT IN POLITICAL ADVOCACY ACTIVITIES.

THE CONTAMINATION PRINCIPLE WOULD RESULT IN DISALLOWANCE OF COSTS FOR LEGITIMATE MARKETING ACTIVITIES AS WELL. MARKETING EXPENSES INCLUDE COSTS FOR APPLYING OR MAKING A PROPOSAL OR BID, OR PROVIDING INFORMATION IN CONNECTION WITH SUCH AN AGREEMENT.

TO RESTRICT SUCH ACTIVITIES THROUGH DISALLOWANCE WILL HAVE THE EFFECT OF CONSTRAINING THE REGULAR EXCHANGE OF DATA AND DIALOGUE WHICH CAN HELP DEVELOP SOLUTIONS TO FUTURE REQUIREMENTS. MARKETING AS A TOTAL FUNCTION BEARS, AND SHOULD BEAR, NO RELATION TO POLITICAL ADVOCACY.

THE DEFINITION OF POLITICAL ADVOCACY ALSO ENCOMPASSES CONTACTS WITH STATE AND LOCAL GOVERNMENTS ON MATTERS OF DIRECT CONCERN TO CONTRACT PERFORMANCE. EFFORTS BY LOCAL PLANT MANAGERS OR EMPLOYEES TO COOPERATE WITH CITY COUNCILS OR OTHER LOCAL BODIES ON MATTERS RELATING TO ZONING LAWS, UTILITY RATES, RIGHTS-OF-WAY, ETC., WOULD CAUSE THESE EMPLOYEES' SALARIES TO BE DISALLOWED FOR A YEAR. THIS WOULD INEVITABLY RESULT IN CONSTRAINTS ON THE ACTIVITIES OF CONTRACTOR PERSONNEL IN DECIDING MATTERS DIRECTLY RELATED TO THE HEALTH AND SAFETY OF THEIR EMPLOYEES.

ALL OF THESE UNREASONABLE, PUNITIVE AND BURDENSOME EFFECTS WILL FALL MOST HEAVILY ON SMALLER BUSINESSES, SINCE THESE ARE MOST VULNERABLE TO ABSORBING COSTS OF DOING BUSINESS WITH THE GOVERNMENT. IT IS NO EXAGGERATION TO SUGGEST THAT MANY WILL SIMPLY LEAVE THE GOVERNMENT MARKETPLACE RATHER THAN SUBMIT TO THE ADDED EXPENSE OF PHYSICAL SEPARATION OF POLITICAL ADVOCACY RESOURCES AND THE IMPOSITION OF NEW AND COMPLEX ACCOUNTING SYSTEM REQUIREMENTS.

THE EFFECT WILL BE TO FURTHER ERODE COMPETITION FOR GOVERNMENT CONTRACTS, AGAIN A VIOLATION OF THE STATED CONCERNS OF MEMBERS OF CONGRESS AND THE EXECUTIVE BRANCH.

AMONG THE MOST FUNDAMENTAL AND CHILLING EFFECTS OF ALL, HOWEVER, WILL BE THE UNJUSTIFIABLE RESTRICTION ON THE EXERCISE OF CONSTITUTIONALLY GUARANTEED RIGHTS. SMALLER BUSINESSES MAY IN SOME INSTANCES SURRENDER THEIR FIRST AMENDMENT RIGHTS IN ORDER TO CONTINUE TO RECEIVE GOVERNMENT CONTRACTS.

THE OMB PROPOSAL WILL INHIBIT ADVOCACY BY BUSINESS AND TRADE GROUPS IN GENERAL TO THE ADVANTAGE OF THOSE INTERESTS, BOTH FOREIGN AND DOMESTIC, WHICH OPPOSE THEM IN THE POLITICAL ARENA.

HAVING THUS ADDRESSED A NUMBER OF CONCERNS COMMON TO A LARGE SEGMENT OF OUR INDUSTRY, I WOULD NOW LIKE TO TOUCH BRIEFLY ON THE SPECIFIC EFFECTS WHICH THESE PROPOSALS WILL HAVE ON TRADE ASSOCIATIONS WHOSE MEMBERSHIPS CONSIST IN SIGNIFICANT MEASURE OF FIRMS INVOLVED IN GOVERNMENT CONTRACTING. TRADE ASSOCIATIONS PROVIDE A NUMBER OF VALUABLE SERVICES TO THE GOVERNMENT AND THE PUBLIC - INCLUDING THE DEVELOPMENT OF TECHNICAL STANDARDS, PERFORMANCE OF MARKET STUDIES, AND THE HOLDING OF EDUCATIONAL SYMPOSIA. THE PROHIBITION DISALLOWING MEMBERSHIP DUES IN ASSOCIATIONS ENGAGING IN ANY DEGREE OF POLITICAL ADVOCACY AS A REIMBURSABLE COST WOULD LIMIT THE ABILITY OF THESE GROUPS TO CONDUCT SUCH PROGRAMS THROUGH THE CURTAILMENT OF INDUSTRY PARTICIPATION.

IN ADDITION, IT MUST BE UNDERSTOOD THAT IF, AND WHEN, AN ASSOCIATION DOES ENGAGE IN POLITICAL ADVOCACY ACTIVITIES, IT IS DONE ON A CONSENSUS BASIS REFLECTING THE VIEWS OF EITHER THE WHOLE MEMBERSHIP OR A SEGMENT THEREOF. SUCH A CONSENSUS PROCESS MIGHT MEAN THAT, AT TIMES, THE VIEWS OF A PARTICULAR COMPANY COULD BE CONTRARY OR EVEN NEUTRAL OR DISINTERESTED TOWARD THE POSITION OF INDUSTRY AS A WHOLE.

THEREFORE, THE POLITICAL ADVOCACY ACTIVITIES OF ASSOCIATIONS COULD BE OF LITTLE OR NO DIRECT BENEFIT TO AN INDIVIDUAL MEMBER COMPANY. AS A MATTER OF FACT, A COMPANY MAY JOIN AN ASSOCIATION AND PAY DUES STRICTLY TO SUPPORT TECHNICAL, EDUCATIONAL OR MARKETING PROGRAMS.

IN ADDITION, THE BURDEN PLACED ON AN INDIVIDUAL GOVERNMENT CONTRACTOR TO MONITOR AND ASCERTAIN THE PRESENCE AND DEGREE OF POLITICAL ADVOCACY PROGRAMS WOULD BE AN UNREASONABLE BURDEN IN THAT THE ASSOCIATION ACTIVITIES MAY BE CARRIED OUT IN AREAS FAR REMOVED FROM THE INTEREST OR PARTICIPATING AREAS OF A MEMBER.

DUES TO AN ASSOCIATION ARE PREPAID IN MOST INSTANCES, AND AT THE TIME OF PAYMENT, AN INDIVIDUAL COMPANY WOULD HAVE NO IDEA AS TO THE FUTURE POLITICAL ADVOCACY ACTIVITIES — AGAIN IMPOSING AN UNREASONABLE BURDEN ON GOVERNMENT CONTRACTORS.

FINALLY, CONGRESS LEGISLATIVELY HAS DETERMINED THAT TAX-EXEMPT ORGANIZATIONS MAY USE "PUBLIC" OR TAX-EXEMPT FUNDS FOR DIRECT LOBBYING PURPOSES. THE REGULATIONS BEING PROPOSED FOR TRADE ASSOCIATIONS CONTRAVENE THAT LEGISLATIVE INTENT.

IN CLOSING, MR. CHAIRMAN, LET ME REITERATE THE POSITION OF OUR ASSOCIATION THAT THE PROPOSED POLICY AND IMPLEMENTING REGULATIONS ARE UNJUSTIFIABLY BURDENSOME, INCONSISTENT WITH CONGRESSIONAL INTENT, AND WILL CAUSE FINANCIAL AND OPERATIONAL DISRUPTION WHICH WILL FAR OUTWEIGH ANY BENEFIT TO BE DERIVED FROM THEIR IMPLEMENTATION. WE URGE YOUR ATTENTION, AND THAT OF OTHER CONCERNED MEMBERS OF CONGRESS, TOWARD SEEKING WITHDRAWAL OF THIS ILL-CONCEIVED PROPOSAL. TO THAT END, REPRESENTATIVES OF THE ASSOCIATION WOULD BE PLEASED TO WORK WITH YOU AND MEMBERS OF YOUR STAFF IN ANY WAY YOU FEEL APPROPRIATE.

I WOULD BE PLEASED TO RESPOND TO ANY QUESTIONS.

Mr. BROOKS. Thank you very much for a good statement. It was well thought out, constructive, and helpful.

Does your organization have purely informational contacts with Government agencies that would be curtailed by the proposed OMB regulation?

Mr. McCLOSKEY. We certainly have a number of purely informational activities that would be impacted. Whether they will be curtailed depends on the companies themselves, and on the number of member companies which would decide to stay in and continue to participate.

In our association we have broad representation by a number of industry segments. In one group within the association we are concerned with consumer electronics activity; in another, government electronics; in another, telecommunications and related activities.

Right now there is a major issue on the consumer side concerning whether or not it should be legal for programs to be taped off the air.

The activities we are involved in with respect to that area of concern might in some way affect the EIA government division, which has no interest in that particular issue under the provisions of Circular A-122 as currently proposed.

So you would call into question whether the association's activities which are paid for out of the dues of the members that are in one portion of the business would unduly affect those activities involving another business completely. It would be an absurd result.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you very much. I don't have any questions.

Mr. BROOKS. Thank you very much for coming down.

Next we will hear from Mr. Robert O. Bothwell, executive director of the National Committee for Responsive Philanthropy. He has also served as Deputy Director of the U.S. Office of Economic Opportunity, Community Action Research and Demonstration Division, and has worked for NASA, the U.S. Conference of Mayors, the National League of Cities, and the National Urban Coalition.

We welcome you here today. We will be pleased to enter your statement in the record in its entirety.

Mr. BOTHWELL. Yes, sir, I would welcome that.

Mr. BROOKS. And perhaps the foundation factsheet, which I think has some good analyses in it, should also be put in the record.

STATEMENT OF ROBERT O. BOTHWELL, EXECUTIVE DIRECTOR, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY

Mr. BOTHWELL. Certainly, sir. Thank you for that. I would like to offer a quick summary of my testimony.

My name is Robert Bothwell, executive director of the National Committee for Responsive Philanthropy. The committee is a coalition of minority, women's, consumer and other organizations concerned with social justice. We work with our membership and with hundreds of other such organizations to increase the very small amount of philanthropic money that goes to newer, smaller, non-profit organizations, especially those dealing with nontraditional or unpopular causes.

I am here today to express very strong opposition to the proposed revisions to Circular A-122. You have already heard from many that these revisions would have a devastating effect on many important nonprofit organizations. I would add particularly that the small nonprofit organization would be most affected.

In addition you have also heard that this would curtail, have a chilling effect on, the public debates in which these organizations take part. We would agree with that. But so many have spoken to that, I don't want to, nor could I add too much about their analyses.

The prime additional reason to be here today is to point out that the drastic changes that are proposed to Circular A-122 are not an isolated phenomenon. In fact they are the genesis perhaps of a Hydra-headed monster.

For example, the Circular A-122 revisions are remarkably similar to changes made just 2 weeks ago in the Federal Government's on-the-job charity fundraising drive, the Combined Federal Campaign.

This campaign, one of the largest in the country, raises \$100 million a year in charitable contributions from Federal employees. From Federal employees, mind you, not from the Federal Government. The Combined Federal Campaign has just been subjected to the same devastation as the Circular A-122 changes and it would indeed wreak some havoc on the charities that now participate in it, as well as those that would like to but have not yet been able.

Let me give you the quote in this new Executive order that will do such damage:

Any organization that seeks to influence * * * the determination of public policy through * * * advocacy, lobbying or litigation on behalf of parties other than themselves will simply no longer be eligible to receive Federal employee contributions.

The main victims of this change are going to be organizations that work actively with the needy, minorities, women, and to preserve a healthy environment. But it is not going to stop there. You heard the American Lung Association say how it, too, would be affected by the Executive order. I want to give you another example.

I was up in Boston this weekend. There is in Boston an organization by the strange name of BUG, which stands for Boston Urban Gardeners. This group develops community vegetable gardens for low- and moderate-income neighborhoods as a helpful way of dealing with food shortages and nutrition. It has had lots of Federal dollars. Those dollars are now disappearing. The organization is desperately trying to increase its private funds.

What it has done in the past year is join with 14 other various community local service organizations to seek private funds available through workplace charity drives.

BUG has a goal, to seek private contributions from State employees for their worthwhile efforts of developing community gardens in low income neighborhoods. But in seeking to raise those private funds from State employees they are going to have to advocate to the Governor's office and indeed even lobby the legislature, since currently only one or two organizations are allowed to solicit from State employees.

What you can see is that the proposed revisions to Circular A-122, would inhibit this excellent volunteer organization from advocating or lobbying in Massachusetts to gain access to State employee contributions, because the organization is small with few staff, none of whom could the organization afford to dedicate totally to lobbying, and because the organization could not afford to set up a separate office for its limited lobbying. But the new CFC Executive order, another Hydra head of the Circular A-122 revisions, would be even more disastrous for this organization as it would totally prohibit the organization from lobbying to seek State employee contributions if the organization wants to receive Federal contributions.

So the administration, which is publicly encouraging voluntarism and private giving, has raised more regulatory barriers to this excellent voluntary organization trying to increase its private giving. This is utter hypocrisy and it is devastating in its impact not only for this little Boston organization but for thousands more like it across the country.

To conclude, what I would urge the committee is not only to seek complete withdrawal of the proposed revisions to Circular A-122 but also to eliminate the side effects of these insidious revisions by taking whatever action is necessary to gut or to override the new Executive order on the Combined Federal Campaign.

Thank you very much for this opportunity to testify.

[Mr. Bothwell's prepared statement follows:]

TESTIMONY

of

Robert O. Bothwell
Executive Director
National Committee for Responsive Philanthropy

to the

Subcommittee on Legislation and National Security
of the
Committee on Government Operations

March 1, 1983

My name is Robert Bothwell. I am executive director of the National Committee for Responsive Philanthropy. The Committee is a coalition of minority, women's, consumer and community organizations. We work to increase the very small amount of philanthropic money that goes to these types of organizations.

I am here today to express our strong opposition to the Office of Management and Budget's proposed revisions to Circular A-122, revisions that we think would have a devastating effect not only on many important private, nonprofit organizations, but also on the vital debate about public policy. We are alarmed by OMB's proposals because they would control not only traditional lobbying of legislators, but also nearly every other form of speech available to a nonprofit organization, including the right to be heard in the courts, the right to associate with other organizations, the right to criticize or advise government officials, and the right to speak to citizens about important public policy issues. We are also alarmed by OMB's proposals because they would inordinately harm certain types of nonprofit organizations, specifically those that are committed to helping minorities, women, the poor and other people who lack power in our society.

I am also here today to point out that the drastic change in Circular A-122 is not an isolated phenomenon, as well as to explain the role and history of charitable organizations, a role and history that the Reagan Administration is apparently trying to deny.

The Administration's proposed changes in Circular A-122 are remarkably similar to changes made two weeks ago in the government's on-the-job fund-raising drive, the Combined Federal Campaign. The Campaign is one of the largest sources of private support for charitable organizations, raising \$100 million a year in gifts from federal employees.

During the past three years, because of the prodding of Congress and the courts, the list of organizations that federal employees can support has grown considerably. In addition to United Way agencies such as the YMCA and health groups such as the American Lung Association, federal employees can have gifts

deducted from their paychecks for groups concerned about civil rights, women's rights and environmental protection. While giving to the Campaign went down in the year prior to these changes, it has gone up in every year that employees were given a broader range of charities to support.

However, in an executive order signed by President Reagan on February 10, the Administration has decided to eliminate nearly all of these newly-admitted charities. I think the Subcommittee will find the language of that executive order very interesting. In addition to saying that charities can be eligible only if they provide certain types of services to individuals, the executive order says that any organization that "seeks to influence...the determination of public policy through...advocacy, lobbying, or litigation on behalf of parties other than themselves" cannot participate in the Campaign.

The main victims of this change will be organizations that actively work to help the needy, minorities and women, groups such as the NAACP Legal Defense and Educational Fund, the NOW Legal Defense Fund, the Native American Rights Fund, the National Black United Fund, the Martin Luther King Center for Non-violent Social Change, Vietnam Veterans of America Foundation, the Children's Defense Foundation and the Natural Resource Defense Council. However, the executive order will also hurt mainline charities such as the American Lung Association if they do things such as trying to influence government policy on smoking, a fact that an Administration official confirmed to a New York Times reporter (see attached article).

Why are these extraordinary changes being made? The Administration argues that the inclusion of agencies that try to influence government policy has created controversy that will decrease giving. There has indeed been controversy about a few of the newly admitted organizations. However, that controversy has not hurt giving. In fact, during this past fall's campaign, overall giving went up more than 7% according to the Office of Personnel Management, the first time since 1977 that the increase in giving has exceeded inflation.

The real reason these changes are being made in the Combined Federal Campaign is the same reason the changes in A-122 are being made: the Administration's frightening desire to control the actions of private nonprofit organizations, particularly those that are trying to help the people being hurt by many of the Administration's policies.

It is extremely important to realize that the effects of the changes in A-122 and in the Federal Campaign will not be neutral. They will have far more impact on agencies that do not have as many other sources of private funding, especially newer organizations, and agencies run by the poor, minorities, women and community residents. These types of organizations receive very little money from private philanthropy, particularly foundations, corporations and United Ways, a fact that has been documented by numerous studies done during the past decade. We have attached a fact sheet that cites many of these studies. I will note only a couple: in 1978, a Ford Foundation-supported study found that groups trying to improve the status of women received only 0.6% of the money given away by foundations. According to the Conference Board, "women's causes" received but 0.3% of the money given away by corporations in 1980. According to a Latino Institute study, organizations helping Hispanics received but 1% of foundation grants made in 1977 and 1978. These studies are all national-in-scope; the results of studies of philanthropic funding in particular cities or states are even bleaker.

Because of this stark reality of philanthropic funding, it's clear that the severe restrictions on advocacy contained in Circular A-122 and the new executive order for the Federal Campaign will strike hardest on organizations helping women, minorities and the poor. These organizations are struggling simply to survive; they don't begin to have the private funds to set up separate staffs and offices to do advocacy. Thus, what you have here is the Administration that has been so intent on cutting off money to minorities, women and the poor now trying to cut off their voices, as expressed through the organizations that represent them.

I don't think there can be any doubt that part of the motivation for these changes is to hurt many of the organizations that have been criticizing the Administration's policies. It is ironic that the Administration defends Circular A-122 by saying it wants to reduce the political impact of government funding when the effects of A-122 will be profoundly political. It is also ironic that this is the Administration that says it wants to reduce government control over our lives when the effects of these two actions will be to impose severe controls on the actions of private, nonprofit organizations.

But I don't think politics is the only motivation for these two actions. They also reflect a profound misunderstanding of the history and role of nonprofit charitable organizations, as well as a terribly narrow view of the proper relationship between these private organizations and government.

The executive order concerning the Combined Federal Campaign says that any agency that tries to influence public policy through advocacy, lobbying or litigation "shall not be deemed charitable health and welfare agencies...." That is an extraordinary statement. Throughout history, private charitable organizations have tried to influence public policy that affects the people those organizations are trying to help. According to the Oxford English Dictionary, an early definition of "charity" was "fairness, equity." The Hebrew word that translates most closely to "charity" is "tsedaka," which means "justice or righteousness," according to Carl Bakal, author of Charity USA.

In the 19th century, Dorothea Dix spent much of her life advocating for improved treatment of the mentally ill. During the Civil war, the Sanitary Commission, a private group set up to give voluntary support to the army, did not simply provide relief supplies but also prodded the government to see that its resources were used effectively. Its oversight role was extremely important, as have been the oversight roles of hundreds of other private charities. In the lead essay for a blue-ribbon study of philanthropy done in the 1970s, Robert Bremner says that a "marked tendency" of this country's charities has been to "encourage, assist and even goad democratic government--and democratic citizens--towards better performance of civic duties and closer attention to social requirements."

Congress, the Internal Revenue Service and the courts have all recognized the legitimacy of this role for charities. Indeed, in 1976, Congress expanded the amount of advocacy that charitable organizations could perform. Thus, these actions by the Administration clearly contradict the will of Congress, to say nothing of the way these actions defy the Constitution by trampling on a charitable organization's right to express its views.

These two actions by the Administration not only show an ignorance of the role and history of charities, they also show a distorted view of the proper relationship between charities and government. In a democracy, the government must encourage the voices of people as expressed through the voluntary associations they form, not suppress those voices. In a democracy, those voices are vitally important to make government work. As the government needed the Sanitary Commission during the Civil War to improve its effectiveness, so government today needs to hear about the effectiveness of its many programs from the organizations that are trying to implement or oversee these programs. As a report to the Canadian government by the National Advisory Council on Voluntary Action put it, a democratic government should encourage the participation of private charitable organizations in public policy debates "not because they represent the public interest, but because it is in the public interest that they participate." The Advisory Council believed that direct government support of advocacy organizations was desirable because "it is the responsibility of government to ensure that all possible voices are heard, including dissident voices; and that, on every issue warranting public debate, as many options as possible are presented, documented and considered. Such an approach is a basic condition for an effective democratic process."

Interestingly, instead of worrying about the supposed evils of the government supporting advocacy, the Advisory Council was worried about government funding having precisely the opposite effect. The Council noted that, when a voluntary organization takes government funding to provide some service, it often moves away from an advocacy role into a service-providing role. Plus, the organization's desire to keep receiving government funding often causes it to "become excessively cautious about antagonizing granting agencies and losing future grants." The report adds, "An association may gradually and almost unconsciously accommodate itself to the funder over time. Such accommodation can be seriously compromising, especially for social-action groups."

To summarize, the proposed changes in Circular A-122 would have a devastating effect on private, nonprofit organizations, especially those set up to help minorities, women and the poor. It would also stifle the important dialogue between private, nonprofit organizations and government, making these organizations little more than conduits for government funds. Congress should instruct the Administration to immediately withdraw this proposed change in Circular A-122.

In addition, to be consistent, Congress should also instruct the White House to withdraw the restrictive changes made in the executive order for the Combined Federal Campaign, changes that would also impose severe restrictions on the legitimate activities of charitable organizations. The Campaign should be continued under the rules in effect last fall. Because these rules allowed federal employees to support a broad range of charities, they led to the biggest increase in giving since 1977. It's ironic that President Reagan, who has said so often that he wants increases in private giving to help counter his budget cuts, has agreed to a change that will discourage private giving by federal employees.

I want to thank the subcommittee for allowing me to testify and for becoming concerned about these vitally important issues affecting nonprofit organizations.

The New York Times

THURSDAY, FEBRUARY 17, 1983

Where Charity Begins

By MICHAEL deCOURCY HINDS

Special to The New York Times

WASHINGTON, Feb. 16—If President Reagan has his way, Federal workers will no longer be able to make about \$4 million in payroll pledges to nonprofit groups advocating such things as women's rights, civil rights and environmental issues.

To give more help to the "the poor, the infirm, the hungry and the truly needy," as a Administration official put it, the President will no longer allow Federal workers and servicemen to pledge payroll contributions to charitable groups that advocate social change. Direct donations are, of course, unaffected.

In announcing Mr. Reagan's recent executive order on the subject, Donald J. Devine, director of the Office of Personnel Management, said last Thursday that the President was trying to "avoid the reality and the appearance of the use of Federal resources in aid of fund raising for political and advocacy groups."

This decision could mean a loss of several million dollars to about 36 so-called legal defense funds.

Planning a Challenge

Groups likely to be cut from the official roster include the Sierra Club Legal Defense Fund, the NAACP Legal Defense and Educational Fund, Inc., Vietnam Veterans of America Foundation and the Center for Science in the Public Interest. A coalition of these groups, which gained access to the Federal paychecks only in the past few years, met today to start planning a legal strategy to remain in the annual fund drive.

"It's utterly hypocritical of President Reagan to say he wants to increase private giving and then cut dozens of charities from the fund-raising campaign," said Timothy Saasta,

Legal defense funds are organizing to challenge the executive order.

a spokesman for the National Committee for Responsive Philanthropy. The new eligibility criteria are likely to exclude only a few conservative groups. Prominent among these

is the National Right to Work Foundation, which fueled the long-simmering controversy by gaining admission to the Federal Combined Campaign last July. Labor unions fiercely opposed participation by this group, which provides free legal service to "victims of compulsory unionism," according to Joanna Boyce, a spokesman.

Drive by United Way

Such controversy does not sit well with the mainstream charities, which rely heavily on payroll contributions made to the United Way of America. United Way, which collected \$1.68 billion from all public and private sources in 1981, organized a coalition of 20 major charities last year to petition the President to consider new restrictions. His executive order closely follows their requests.

Debate over admission to the Federal charity drive began in 1952, when President Kennedy opened up the program to "health and welfare charities and others."

Mr. Reagan's order states that eligibility "shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals of their families." It adds, "Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves" shall not be eligible to participate.

Limitation on Testifying

Much uncertainty exists because the personnel office has yet to write regulations putting the executive order into effect. The restrictions on lobbying, for example, are so stiff that representatives of the American Lung Association, which supported the order, would no longer be able to testify at Congressional hearings in favor of advertising regulations for cigarettes. Joseph A. Morris, general counsel of the Federal personnel office, the principal author of the executive order, said in an recent interview that any group that lobbied for any public policy would be ineligible for participation.

The stakes are big. Last year, the 2.8 million Federal workers and 2.2 million members of the armed services authorized the Government to deduct \$100 million for donations to 111 individual charitable organizations and 11 umbrella groups such as United Way. Federal donations increased by a near record of seven percent, but pledges earmarked for United Way decreased by more than \$4 million.

"A lot of the money went to special interest groups," said Steve Delfin, a spokesman for United Way. "I'm not saying that they don't have valid social roles, but they tend to drain money away from the priority health and welfare needs."

The Washington Post

Wednesday, February 23, 1983

Advocacy Groups Protest New Rules Restricting the Federal Charity Drive

By Karlyn Barker
Washington Post Staff Writer

President Reagan's newly issued restrictions on the government's annual charity drive have drawn protests from civil rights, environmental and women's rights groups, who say they are being kicked out of the drive because they advocate liberal social and public policy views.

The groups, organized as the National Coalition to Expand Charitable Giving, expect to go to court soon to fight their ouster on constitutional grounds. They have focused their objections on a section of the president's executive order that bans participation in the drive by groups that try to influence public policy through advocacy, lobbying or litigation.

Among some 36 organizations likely to be cut from the drive's eligibility list are the NAACP Legal Defense and Education Fund, the Vietnam Veterans of America Foundation, the Children's Defense Fund, the Sierra Club, the Center for Science in the Public Interest and legal defense and education funds for the National Organization for Women and Federally Employed Women.

Reagan's order, according to Donald J. Devine, director of the Office of

Personnel Management, will encourage federal workers to make payroll contributions to more traditional health and welfare agencies that provide direct services to the poor.

But some of the advocacy groups affected complain that no other charitable solicitation drive is limited in this way. They warn that mainline charities such as the American Lung Association, Planned Parenthood and even United Way, which collects 72 percent of the contributions, could be excluded because of the lobbying and legal advocacy prohibitions.

"It's an assault on private giving," argues Robert Bothwell, executive director of the National Committee for Responsive Philanthropy.

Payroll deductions to the Combined Federal Campaign (CFC) raised \$13.7 million here and \$93 million nationwide from government workers in 1981, constituting the largest charity solicitation drive in the country. Last fall's drive is expected to top that sum by about 7 percent nationally and 4.5 percent in the Washington area, although the total is still being calculated.

With millions of dollars at stake, groups in the CFC have fought to

stay there and other organizations have sued for the right to participate in the drive. Last year's drive included liberal and conservative groups and legal defense funds who would be barred from participation under the new executive order.

The new restrictions are being hailed by the United Way of America, which formed a coalition of 20 other CFC groups last year to lobby for the changes.

"Opening up the campaign to advocacy or political groups causes people to get upset," said Steve Delfin, director of media relations for United Way of America. "And when that happens, they don't designate [to a specific charity], they boycott."

Delfin said he hopes the impending regulations implementing the order will be flexible enough on the advocacy section so as not to be a problem for his group.

Newly admitted groups say overall contributions have climbed as the drive has been opened up, but Delfin said United Way-funded agencies lost \$3 million in contributions during the 1982 drive because of the controversy surrounding the admission of advocacy groups, particularly the National Right to Work Foundation.

FOUNDATION FACT SHEET

5/4/81

GENERAL INFORMATION:

21,505 "active grant-making" foundations

\$34.8 billion in assets

\$2.24 billion in grants during 1979

Foundations account for approximately 5.2 percent of total philanthropic giving (which totaled over \$43 billion in 1979)

Philanthropic expenditures equal between 3-4% of the federal government's expenditures on education, health, social welfare and science.

Of the 21,505 foundations:

18,821 have assets under \$1 million

3,138 have assets above \$1 million or make grants totalling at least \$100,000

473 have assets above \$10 million

41 have assets above \$100 million

DISTRIBUTION OF FOUNDATION GRANTS:

Education	29%	International Activities	6%
Health	20%	Humanities	11%
Sciences & Technology	19%	Religion	2%
Welfare	13%		

According to a 1975 National Science Foundation-sponsored study done by the Human Resources Corporation:

Spanish-heritage groups received 0.8 percent of foundation grant funds in 1972-73 (they constituted 5 percent of the population)

Asian Americans received 0.1 percent of foundation grant funds (they constituted 0.6 percent of the population)

Less than half of those grants went to organizations controlled by the minorities.

According to a 1978 study of 131 Chicago foundations commissioned by Chicago's Donor's Forum: of a total \$74 million in grant funds,

1.4% went to neighborhood and community development

1.7% to social equality

0.8% to environment

3.9% to agencies controlled by Blacks and 0.5% to agencies controlled by Hispanics (nearly half of Chicago's population is minority)

70 agencies recieved 70% of the total; one recipient -- the University of Chicago--received 10%

According to a 1977 study of 196 foundations based in the Southeast which was commissioned by the Southeastern Council of Foundations: of all foundation grants,

2% went to minority organizations (minority populations in Southeastern states range from 12 to 35 percent)

0.5% went to "human rights and minority affairs."

According to a 1978 study of 153 Washington, D.C. foundations done by the Community Support Fund: of all foundation grants distributed to organizations which provided apparent benefits to D.C. residents,

2.0% went to legal assistance
 2.0% to housing and neighborhood development
 .27% to employment/labor
 .58% to rights of racial minorities, women, elderly and youth
 .27% to energy/science/transportation
 .25% to consumer affairs
 .14% to economic development/small business
 .09% to public policy
 .00% to natural resources/environment

"St. Albans, a private school, received more than the entire category of housing and neighborhood development."

According to a 1973 Council on Foundation survey of 460 member foundations:

3.4% of their grant monies were directed specifically to women (for scholarships) and/or to primarily feminine organizations or causes

According to a 1979 study by the Ford Foundation:

less than 0.6% of foundation funding in 1976 went to projects designed to improve women's rights and opportunities, and

One-third of foundation money for this purpose came from one foundation during the years 1970-1976.

FOUNDATION GOVERNANCE:

According to a 1977 study by John Nason which was commissioned by the Council on Foundations:

0.3% of foundation trustees are minorities
 "Foundation trustees are for the most part a self-perpetuating group, a social and economic elite,...still convinced that the foundation is their private affair."

According to a 1976 study by the Planning Committee for Women in Foundations:

34% of foundations have no women board members
 There are 6.5 males trustees to 1.5 female trustees
 19% of all trustees are women

FOUNDATION ACCESSIBILITY:

According to the Council on Foundations:

less than 500 of the country's 21,505 foundations publish annual reports.

Mr. BROOKS. Thank you for your very perceptive and well-stated remarks.

I would like to ask you one question. Do you see the proposed changes in the OMB circular and CFC regulations as an effort by the administration to favor only those organizations that are friendly to it?

Mr. BOTHWELL. Undeniably so. The main targets for the new Combined Federal Campaign Executive order are clearly advocacy organizations such as the NAACP Legal Defense, and Education Fund, environmental organizations such as the Natural Resources Defense Council, women's organizations, and many local organizations similarly advocating on minority, women's, environmental and other social justice issues.

However, the strange thing, the unintended side effect, is that the new CFC Executive order is also going to have a tremendous impact on the very traditional mainline charities that deal with every manner of social service, housing, economic development, employment issues in this country. So it is like the administration, I think, as Congressman Conable has said, tried to use a 16-inch gun to kill a fly.

Mr. BROOKS. I sure thank you.

Mr. Horton.

Mr. HORTON. I have no questions. Thank you very much.

Mr. BROOKS. Our next witness is Mr. John D. Kessler, vice president for public affairs of the American Heart Association. In this capacity he is director of the office of public affairs here in Washington. Prior to his current appointment he served for many years with the Heart Associations of Virginia, Maryland, and Illinois.

Mr. Kessler received his bachelor of science degree from Bradley University and has worked as a reporter, columnist, and freelance writer.

We are delighted to have you here and we will appreciate hearing your comments.

STATEMENT OF JOHN D. KESSLER, VICE PRESIDENT FOR PUBLIC AFFAIRS, AMERICAN HEART ASSOCIATION

Mr. KESSLER. Thank you, Mr. Chairman. I am John D. Kessler and I am vice president for public affairs of the American Heart Association.

The American Heart Association is a major national voluntary health organization that was organized in 1949 and that has as its mission the reduction of premature death and disability from cardiovascular disease.

The AHA represents some 120,000 volunteers, including 20,000 scientific members, and some 2 million volunteers who are engaged in its program and fundraising efforts at the community level.

The AHA is a charitable, nonprofit organization and is tax-exempt under section 501(c)(3) of the Internal Revenue Code.

Mr. Chairman, I appreciate the opportunity to address the committee on the revision of Circular A-122 that is currently proposed by the Office of Management and Budget, and on Executive Order 12404 dated February 10, 1983, which governs the Combined Federal Campaign.

The American Heart Association is deeply concerned that the proposed revision of OMB Circular A-122 and Section 3 of Executive Order No. 12404 on the Combined Federal Campaign would force health, educational, and other organizations to make an unacceptable choice, that being either to relinquish their constitutional right to advocate their positions within lawful limits or to abandon their role as health providers who depend to some extent upon Federal grants and contracts or upon the charitable contributions of Federal personnel to support their programs.

I would like to address two points that are very much at issue today. First, the Federal Government has a legitimate role and, in fact, a serious responsibility to protect and promote the health and welfare of its citizens.

Second, the right of Americans, either individually or collectively, to engage freely in speech and political expression is guaranteed under the first amendment to the Constitution.

Both of these traditional precepts would be undermined if these proposals are approved. To receive Federal moneys a health and welfare regulation would be required by Circular A-122 substantially to curtail, or to give up altogether, its right to advocate its positions to Congress, to Federal health officials, and to the regulatory agencies.

In order to retain the right to advocacy an organization would have to give up the CFC contributions of Federal employees that could be, for certain small organizations, an important share of the resources that enable it to serve health and welfare needs. We at the American Heart Association strongly object to such a choice even being suggested, much less ordered.

The American Heart Association would not itself be substantially affected by the proposed revision of Circular A-122 since we participate in few projects that are funded directly by Federal grants or contracts. We have no quarrel with the requirement that Federal funds should not be used directly to advocate or to influence public policy.

However, Circular A-122, a masterpiece of hair splitting detail, goes well beyond that caveat and would make it impossible for many organizations that receive even small grants to assist the Congress in its goal to promote a healthier America.

In each of its last three budget proposals the administration has made major cuts in the funding levels for the biomedical research and prevention programs of the National Institutes of Health. We at the American Heart Association, along with the American Lung Association, the American Cancer Society, and countless other health organizations make it a point each year to present scientific testimony to congressional committees about the devastating effects this lack of funding would have on the research capability and productivity of the NIH.

Alerted in part by this advocacy Congress has in its wisdom increased NIH funding levels well beyond the President's request each year. This is but one of many instances in which our ability to educate and inform the Members of Congress has worked to the common good. The proposed regulations could prevent such worthwhile undertakings.

It would further appear that these measures would remove the right granted to charitable organizations under section 501(c)(3) of the Internal Revenue Code to engage in limited advocacy activity. American Heart feels that this right, now guaranteed under law, should remain intact. It should not be abridged by agency rulemaking that would directly contravene existing tax laws.

We believe that the proposed revision of Circular A-122 is too broad and expansive in its definition of political advocacy.

It would extend the definition of advocacy far beyond the scope of any restrictions currently imposed by Congress through appropriations bills, program statutes, or the tax laws.

In point of fact I could not, without invitation, appear before you today or even submit comment to OMB on future revisions to Circular A-122 without engaging in political activity as defined in this proposal.

We believe that the OMB has exceeded its statutory authority which is to evaluate and oversee the operation of Federal programs. OMB has no statutory authority to restrict nonprofit organization grantees from lawful participation in the Federal decision-making process.

The proposal would exact unreasonable and excessive penalty for violation of its restrictions. Not only would an organization be denied reimbursement for political activity but it would also be denied reimbursement for nonpolitical activities as well.

The American Heart Association urges that A-122 be withdrawn. If the accounting for expenditure of Federal grant or contract funds must be revised, the proposed rule should be replaced with language better conceived, much more narrowly drawn, and more firmly based on current tax laws and the intent of Congress.

We would also urge that the Executive Order No. 12404 be further amended, or at least that the regulations proposed by the Office of Personnel Management to implement the Executive order clearly affirm that those organizations who currently have the right under law to participate in limited political advocacy activities be allowed to continue those activities without becoming ineligible to participate in the Combined Federal Campaign.

This Executive order was published on February 10, 1983, as an amendment to Executive Order No. 12353 governing the Combined Federal Campaign.

The principal effect of the amendment, and one supported by the American Heart Association and other major health and welfare organizations, is to limit eligibility for participation in the CFC to voluntary charitable organizations that provide support for direct health and welfare services to individuals and their families.

However, the amendment also provided that agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign.

In discussions among charitable health and welfare organizations, this last provision restricting political advocacy has been termed the baby with the bath water provision.

On the one hand it would seem to favor health and welfare organizations with a special place within the Combined Federal Campaign.

On the other hand, it would deny them eligibility to participate in the CFC if they continued to engage in activities allowable under current tax laws.

This seems to be a case of the Executive order giveth, and the Executive order taketh away.

The American Heart Association sees nothing illegal, improper, or inappropriate in carrying out our traditional role of advocacy on behalf of the public health of our Nation. We are already absolutely restricted from any overt political activity by section 501(c)(3) of the IRC. Strict limitations are imposed therein both on the kind and the extent of educational and informational efforts we can undertake.

This proposal would force us to choose between a substantial portion of our income from the Combined Federal Campaign and the lawful execution of our right to advocate public policies that serve the health interests of all Americans.

I realize that in my comments I have addressed the issue of Circular A-122 and that of the Executive order on the CFC. Perhaps it is inappropriate to mingle these separate concerns before this committee.

One rule, A-122, is being promulgated by the Office of Management and Budget, and the regulations to implement the Executive order will soon be promulgated by the Office of Personnel Management.

One wonders how or why these two very similar but separate issues have arisen within such a short span of time in two separate agencies of the Federal Government. Perhaps they are but separate manifestations of a central concern within the administration that the Congress, in imposing tax laws and other constraints on charitable organizations, has somehow been so permissive with respect to political advocacy that the administration must intervene with agency rules to correct the situation.

Our hope is that this committee and other committees of Congress will respond by denying funds to these agencies to implement these rules if they are not, as they should be, withdrawn or at the very least drastically amended.

Mr. Chairman, I thank you for the opportunity to speak today.

Mr. BROOKS. Thank you very much. I have one question, Mr. Kessler.

If local chapters of organizations such as yours are compelled to duplicate facilities and personnel in order to comply with the OMB proposal, do you foresee an increase in the cost of delivering services both to the Federal Government and to others?

Mr. KESSLER. Yes, sir. Duplication of those services would be impossibly costly for small organizations. What very likely would result is that these organizations would withdraw from advocacy, would withdraw from seeking to participate in developing the health plans of their State or city governments.

The advocacy rule is too broad and sweeping. As Mr. Horton said, it would throw out the baby with the bath water.

Mr. BROOKS. Mr. Horton.

Mr. HORTON. I have no questions.

Mr. KESSLER. Thank you.

Mr. BROOKS. Now, the first shall be last and the last shall be first. We have Mr. Jacob Clayman, president of the National Council of Senior Citizens, as our last witness. Until his retirement in 1979, Mr. Clayman was president of the Industrial Union Department of the AFL-CIO. He was a member of the Advisory Committee of the 1981 White House Conference on Aging and has served as the president of the Consumers Federation of America, a member of the Federal Advisory Council on Employment Security, and trustee of the United Community Funds and Councils of America.

Mr. Clayman received his bachelor's degree from Oberlin College in 1927 and his law degree from the University of Michigan in 1930. He has practiced law in Detroit and served in the Ohio Legislature.

We welcome you here today. Please proceed with your remarks.

STATEMENT OF JACOB CLAYMAN, PRESIDENT, NATIONAL COUNCIL OF SENIOR CITIZENS

Mr. CLAYMAN. Thank you, Mr. Chairman, and Congressman Horton. That is a better introduction than I normally get, and I thank you for it.

Mr. BROOKS. You deserve it all.

Mr. CLAYMAN. As I come up at the end of this great proceeding I thought I almost heard a psychic sigh of relief from the people up front. I think it is a magnificent achievement that you have run through 29 witnesses or more in this brief period. Let me see if I can bobtail my written statement.

Mr. BROOKS. We will accept the full statement for the record and you go ahead and make your statement. It is a good statement.

Mr. CLAYMAN. Let me tell you a bit about the National Council of Senior Citizens to make the case I would like to make. The National Council of Senior Citizens intensely, passionately believes in honest advocacy. We were born in the cradle of typical old-fashioned American advocacy in the early 1960's, the battle for medicare started in earnest in the country and in Congress. Answering the call of that struggle we started the National Council and so we fought with might and main; and in 1965, we along with others prevailed in that fight for another piece of social justice for the elderly.

Yes, we believe in advocacy for everybody, individuals and organizations. This is simply another way of saying that we believe in the first amendment and any impingement of that sacred amendment will make America the lesser for it.

That, in our judgment, is what the new proposed amendments to Circular A-122 would do.

Another facet of the National Council: We also, for example, for 14 years, through Democratic and Republican administrations, have managed a portion of the senior community service employment program known as title V, a Federal program to train elderly poor people and return them to permanent jobs in the private sector.

In addition, these 54,200 older workers in the program perform invaluable community services in nursing homes, day care centers, and in social service agencies. I believe, and I hope this isn't puffery, that we have done a remarkable job of it.

The administrative costs to the Government is only 6.5 percent and that, Mr. Chairman, is extraordinary. It means that we have been darned efficient. It means that we have been doing an honest job. It means that we have not tried to rake any undue profits, indeed any profits from the program.

No one has raised a finger of concern or criticism at our management of the activities in this program. No one has charged that we have used Federal funds for political purposes. But, apparently, to those who promulgated the amendments to Circular A-122, we have committed the desperate crime of having people who work on this program housed on one floor of our building which we recently purchased. We use the same Xerox equipment and the mailroom personnel for the regular and Federal program, but, of course, charging the Federal Government only for those services performed in behalf of title V activities.

The amendment says we can't do this, we must move the title V employees elsewhere, we cannot utilize the economies which the use of our full facilities makes possible.

In effect, the Government is saying "increase overhead costs, increase the complexity of doing a decent job," and this foolishness inevitably would hamper our capacity to perform as effectively as we now do.

Indeed, there are some valid questions that can be asked, that the Government needs to ask. One, for example, is: Is the organization receiving Federal funds and using them efficiently and effectively in furtherance of the law upon which the grant is based?

That is a valid and honest question.

The second question is: Is the organization which is the recipient of Federal funds using those funds for political purposes? That is a valid and honest question.

But the OMB amendments go far beyond these sensible and pertinent questions and would raise such irrelevant matters as the absolute separation of office space, usage of equipment and other inconsequential arrangements.

These questions can only serve the purpose of harassment and not the meaningful purpose of effectively carrying out the mandate of the law.

Now, then, let me make a very practical little point here. This program occupies one floor of our building. It is separate from the rest of the building. It is self-contained. Our charge is, I think, \$14 a square foot. If we have to move we would have to pay at least \$24 or \$26 a square foot. For what purpose? What sense? What practicality?

That is a question that I think the answer to is rather obvious.

But most of all, and this is what is most relevant, at least in my mind, most of all it will seriously tend to still the voice of advocacy. It will destroy small organizations of senior citizens, charity institutions and others which have accepted Federal funds and this, in my judgment, would be a tragedy.

Heaven knows there are too few organizations now to present the views of the poor, the consumers and the elderly. The Government performs a great disservice to the cause of democracy in our society by depleting, as it would, inevitably, the ranks of these organizations by way of this transparent A-122 maneuver.

Presumably, the alleged purpose of this new proposed set of regulations is to remove politics from Federal grants and contracts. But I am genuinely fearful that the Government's action, itself, is a piece of Machiavellian political mischief.

You will remember that over the past 2 years those on the far right of the political spectrum have inveighed against organizations receiving Federal funds for the poor and the elderly. You will remember that they sounded their clarion call to the White House and Congress trumpeting "Defund the left, defund the left."

My judgment at least is that this present OMB regulation quite apparently is the Government's response to the right wing's challenge. Though masked somewhat, the purpose of the administration, in my opinion, is abundantly clear, indeed transparent: Undermine the nonprofit institutions trying to keep alive the conscience of America.

We urge you to permit this not to come to pass. It is one of the great assets that our society has. It is almost a priceless asset that common citizens, ordinary citizens have the power, for example, and the right to come before a committee like this and plead their case. If this is eroded, if this is eroded, we shall be in trouble.

So we ask you to uphold the worth of advocacy in America and stand fast to the principles of the first amendment.

I probably took more time than I intended to for which I ask your forgiveness.

Mr. BROOKS. We thank you very much. You didn't take too much time. We enjoyed it. You are a great advocate. You have been one all your life. You can continue to be one as far as we are concerned.

Mr. CLAYMAN. Thank you, sir.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you very much. We are happy you could be with us. We appreciate your waiting until the tail end. Thank you.

Mr. BROOKS. Saved the best for last.

[Mr. Clayman's prepared statement follows:]

Statement by

Jacob Clayman, President
National Council of Senior Citizens

Mr. Chairman, members of the Subcommittee, my name is Jacob Clayman. I am the President of the National Council of Senior Citizens, a non-profit public interest group dedicated to serving, protecting and defending the interests of the 4.5 million senior citizens we represent.

At times, such representation takes the form of political advocacy--such as when we fought, hand-in-hand with Lyndon Baines Johnson, for the establishment of a national health insurance program for the elderly, Medicare. And at times, such representation takes the form of service delivery--in our case through the operation of a federal grant program that puts 54,200 low-income older people to work in 127 communities around the country.

Through these activities, we believe that we are serving the legitimate interests of our members, and the elderly in general, and performing a valuable service on behalf of the government. Beyond the restrictions found in current law, we do not see these as functions that should be considered mutually exclusive. In fact, it is far more rational for close coordination to exist between advocacy and service delivery; without it, the ability of our government to meet the needs of its citizenry would steadily deteriorate.

That is why, Mr. Chairman, we were shocked to learn of the proposed new regulations issued by the Office of Management and Budget that would fundamentally alter the way in which non-profit organizations and other government contractors conducted their business. The proposed regulations, innocuously called amendments to Circular A-122 "Cost Principles for Non-profit Organizations" would require a complete segregation of our grant activities from activities termed "political advocacy." The practical effect of this proposal would be that either our federally funded senior citizen employment program and its staff, or individuals involved in advocacy, including the Executive Director, Legislative Department, and Information Department staff would have to leave our recently purchased headquarters. In order to continue receiving grant reimbursement, grant activities and advocacy activities could no longer take place under the same roof.

The OMB definition of advocacy goes far beyond any definition found in current law or regulation and would include among other changes: 1) any activity that attempts to influence government decisions through an attempt to affect the opinions of the general public; 2) any attempt to influence government decisions through communications with any member or employee of a legislative body or with any government official or employee who may participate in the decision-making process; 3) provision of technical advice or assistance to a governmental body or to a committee unless it is in response to a written request. This last restriction would severely hamper communications vital and necessary for effective grant administration.

According to the OMB notice, the reason for issuing these proposed revisions to the A-122 Circular is to

ensure that the use of federal grants, contacts and other agreements by private organizations engaging in political advocacy does not erode or infringe these [First Amendment] constitutional rights, or distort the political process by encouraging or discouraging certain forms of political activity.

In fact, the effect of these revisions would be to do both. According to a recent paper prepared by Jack Maskell of the American Law Division of the Congressional Research Service, the proposed rule would restrict the First Amendment protections, OMB says it is trying to uphold:

...the regulations may work in practice to restrict the use by private organizations of their own personnel, equipment and office space for First Amendment activity if during some period such personnel or equipment were used in carrying out a federal grant or contract and the costs of such use were proportionately allocated to that contract or grant.

Moreover, this rule would very definitely distort the political process. Clearly, large government contractors, particularly defense contractors, would be better able to weather this storm and have ample resources to set up separate offices and continue their political and lobbying activities. Smaller groups, particularly community-based organizations with staffs of three or four people, often use the same resources for both grant and advocacy activities. The effect of the OMB rules on these groups would be

paralyzing. Because the regulations would no longer allow reimbursement for resources partially used in grant activities when these resources are also used in privately funded advocacy activities, such groups would be forced either to give up their government grants or dispense with their legitimate advocacy activities.

Mr. Chairman, I believe that these proposed revisions are a blatant attempt on the part of this Administration to silence those groups which have expressed opposition to the domestic and social policy agenda set by President Reagan. The pretension that these rules merely attempt to separate political advocacy and government grant activities masks a much more insidious goal, that is, to force small non-profit organizations to choose between reliable, secure government funding, or scarce, uncertain private funds in order to function. The former choice means giving up the right to participate in the political process; the latter, in many cases, may mean shutting down.

Regardless of whether these rules are implemented or not, NCSC will survive. We are a large organization with a secure base of financial support derived from our members and other supporting groups. Our voices at least, will continue to be raised in opposition to the policies of this Administration when we see fit to do so. But we, too, will be affected.

As I mentioned, NCSC operates an older workers' jobs program of which I believe most of you have heard, the Senior Community Service Employment Program (SCSEP). For the past 14 years, we have acted as a conduit between the government and some of its lowest income senior citizens to train and place older people in community service jobs. Through this program, thousands of senior citizens have returned to the mainstream of society, working in nursing homes, day care centers and social service agencies. Each year more and more of our Senior Aides are being placed in jobs in the private sector, thereby achieving an important goal set by this Administration as an essential part of its employment policy.

With an historic record of administrative costs of under seven percent, it is no wonder that the Federal government continues to fund our Senior AIDES Program and to seek our opinion concerning program modifications and improvements. However, without any question whatsoever, we believe that the proposed OMB revisions will endanger our fine record of administrative effi-

ciency by barring necessary interactions with the government.

In its expanded definition of political advocacy, the regulations specifically cite "providing technical assistance to a government body" unless requested in writing as one example of unreimbursable activities. This would prevent anyone working on our program staff from notifying the Department of Labor about any sort of management inefficiency or other problem we note in our monitoring responsibilities. For example, recently we noticed that an error in the Department of Labor SCSEP regulations made everyone with an income 125 percent above the poverty level eligible for the program. In reality, it is those with incomes less than 25 percent over the poverty level that are eligible. If these OMB regulations had been in effect, we would have had to remain silent about this error until the Department of Labor found out about it by itself.

Frankly, Mr. Chairman, it would make more sense to consider the sweeping and radical changes proposed in the OMB Circular in the face of serious violations of existing statutes and regulations. I know that in the case of NCSC, at least, we go to great lengths to assure that there is no commingling of federal and private funds, and that grant activities are separate from advocacy activities. Our Senior AIDES Program, its personnel and its office machines are all located on one floor of our small building. While there is some sharing of other facilities such as xeroxing and use of mail room personnel, such sharing is accounted for and the appropriate source is billed for these services. No federal funds that are received by NCSC are used for political purposes.

If the Administration is so convinced that these regulations are necessary, let them come forth with proof. We have seen nothing to substantiate the need for this revision.

Mr. Chairman, if these regulations were to go into effect, the restrictions it would place upon our organization would be difficult to endure. But, ultimately, the real losers would be the elderly people themselves. NCSC, along with so many organizations here today, performs a valuable service to this country. We speak on behalf of those not here to represent themselves. Together with other aging organizations, we have made great stride in reducing poverty, ill-health and isolation among our senior citizens. Our employment program has put thousands back to work in useful part-time jobs.

These new regulations could well reduce our effectiveness in all of these areas, and do so to the detriment of millions of older people. We urge you and the members of this Subcommittee to oppose the issuance of these rules. Thank you.

Mr. Brooks. Both the Congress and the Supreme Court have long recognized the importance of encouraging and fostering the advocacy of ideas by the private sector. Now the administration has proposed to stifle political advocacy by many of our most respected and active business and nonprofit organizations. In the process they threaten the cherished first amendment rights to freedom of speech and association.

The administration has stated that it will issue revised regulations in about 10 days. In my opinion, the only acceptable revision may be the immediate withdrawal of the proposal.

I would like to thank all the witnesses that appeared today and presented testimony. The hearing is adjourned subject to the call of the Chair.

[Whereupon, at 4:12 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—PROPOSED CHANGES TO OMB CIRCULAR A-122

Changes Proposed in the "Cost Principles for Nonprofit Organizations" (OMB Circular A-122) and the Procurement Regulations of DOD, GSA, and NASA

(a) The cost of activities constituting political advocacy are unallowable.

(b) Political advocacy is any activity that includes:

- (1) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsements, publicity, or similar activity;
- (2) Establishing, administering, contributing to, or paying the expenses of a political action committee, either directly or indirectly;
- (3) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof;
- (4) Attempting to influence governmental decisions through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the decisionmaking process;
- (5) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf; or
- (6) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year on activities constituting political advocacy.

(c) Political advocacy does not include the following activities:

- (1) Making available the results of nonpartisan analysis, study, or research, the distribution of which is not primarily designed to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, or any governmental decision;

- (2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision;
- (3) Participating in litigation on behalf of other persons, if the organization has received a Federal, State, or local grant, contract, or other agreement for the express purpose of doing so;
- (4) Applying or making a bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement; or
- (5) Engaging in activities specifically required by law.

(d) An organization has political advocacy as a "substantial organizational purpose" if:

- (1) The organization's solicitations for membership or contributions acknowledge that the organization engages in activities constituting political advocacy; or
- (2) Twenty percent (20%) or more of the organization's annual expenditures, other than those incurred in connection with Federal, State or local grants, contracts, or other agreements, are incurred in connection with political advocacy.

(e) The term, "governmental decisions" includes:

- (1) The introduction, passage, amendment, defeat, signing, or veto of legislation, appropriations, resolutions, or constitutional amendments at the Federal, State, or local level;
- (2) Any rulemakings, guidelines, policy statements, or other administrative decisions of general applicability and future effect; or
- (3) Any licensing, grant, ratemaking, formal adjudication, or informal adjudication, other than actions or decisions related to the administration of the specific grant, contract, or agreement involved.

(f) Notwithstanding the provisions of other cost principles in this part:

(1) Salary costs of individuals are unallowable if:

- (i) the work of such individuals includes activities constituting political advocacy, other than activities that are both ministerial and non-material; or
- (ii) the organization has required or induced such individuals to join or pay dues to an organization other than a labor union that has political advocacy as a substantial organizational purpose, or to engage in political advocacy during non-working hours.

(2) The following costs are unallowable:

- (i) building or office space in which more than 5% of the usable space occupied by the organization or an affiliated organization is devoted to activities constituting political advocacy;
- (ii) items of equipment or other items used in part for political advocacy;
- (iii) meetings and conferences devoted in any part to political advocacy;
- (iv) publication and printing allocable in part to political advocacy; and
- (v) membership in an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year in connection with political advocacy.

APPENDIX 2.—CRS ANALYSIS

March 9, 1983

John J. Lordan, Chief
Financial Management Branch
Office of Management and Budget
Washington, DC 20503

Re: Proposed Revisions to Circular A-122

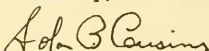
Dear Mr. Lordan:

The YMCA of the USA urges the complete withdrawal of the proposed revisions to Circular A-122 (Federal Register, January 24, 1983). On February 18, the Government Affairs Committee of the board of directors voted unanimously to oppose these amendments. These revisions would hinder YMCAs locally and nationally in their appropriate roles as community leaders and service providers. Further, we believe the revisions directly threaten First Amendment rights to participation in the processes of government, as well as exceed OMB's authority.

The nearly 2,000 YMCAs in this country constitute an invaluable reservoir of experience in the kinds of people-to-people programs this Administration has claimed it desires to foster. Most of this work occurs without government funding. Other programs have required governmental support (sometimes at the government's request) and indeed apply that governmental support to fulfill society's obligations more effectively and more efficiently than direct government action -- to meet needs of the elderly, to help prevent juvenile delinquency, to develop the job skills of unemployed youth, to resettle refugees, etc.

To preclude the participation of YMCAs and other nonprofit service providers in public decision-making is to deny them a fundamental right and to deny government itself the benefit of such informed participation. The appropriate relationship of government and the nonprofit organizations receiving federal funds is already well-defined by restrictions in tax law and in the present Circular A-122. We therefore urge the proposed amendments be withdrawn in their entirety.

Sincerely,



Solon B. Cousins
Executive Director
YMCA of the USA



YMCA of the USA
Washington Office
1725 K Street NW
Suite 208
Washington, DC 20006

(202) 637-0120

Egic Huff
President, National Council
Dale Vandergrau
Chairman, National Board
Solon B. Cousins
Executive Director

cc: House Government Operations Subcommittee on Legislation & National Security
House Judiciary Subcommittee on Civil & Constitutional Rights
Senate Governmental Affairs Subcommittee on Intergovernmental Relations

EXECUTIVE SUMMARY

The Office of Management and Budget has proposed amendments to Circular A-122, "Cost Principles for Nonprofit Organizations" (48 F.R. 3348-3351, January 24, 1983) which deal with (1) the disallowability of the costs of a nonprofit grantee or contractor of the federal government for "political advocacy" activities and (2) the disallowability of the allocation of actual costs of an organization to a federal contract or grant for the organization's equipment, supplies, and personnel used on that contract or grant if such items are used at other times for political advocacy activities. The stated purpose of the proposal "is to ensure that federal tax dollars are not used, directly or indirectly, for the support of political advocacy" (48 F.R. 3348). This report discusses two legal issues concerning this proposal: (1) the authority of OMB to issue these restrictions and to promulgate the stated policy and (2) the First Amendment considerations involved in governmental regulation of political advocacy of private organizations.

The exercise of legislative power is vested in the Congress, and legislative functions may be exercised by an executive agency only insofar as the authority to do so is delegated to the agency by Congress. Chrysler Corporation v. Brown, 441 U.S. 281 (1978); see also Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952). Generally, if no express delegation to act on a particular subject is apparent, the courts will look to determine if the purposes of an executive rule, regulation or other promulgation may rationally be within or have a "nexus" to the purpose of a general statutory delegation of authority. See AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979); Liberty Mutual Insurance Co. v. Freidman, 639 F.2d 164 (4th Cir. 1981).

There is no clear indication of any express statutory delegation of authority from Congress to the Office of Management and Budget to issue rules and regulations regarding political advocacy by nonprofit organizations receiving federal grants, nor to establish rules to effectuate a general governmental policy of non-involvement or nonsubsidization of advocacy. Insofar as the cost accounting and allocation rules in the first part of the OMB proposal prohibit a grantee from allocating to a federal grant the costs of unauthorized advocacy activities, or the costs of any advocacy activities unrelated to the purposes of a grant, such prohibitions on diversion of grant funds may arguably come within some general delegation of statutory authority to OMB under a statutory provision which has grant management, or cost and efficiency purposes, depending on which statute OMB cites as providing such general authority to issue regulations on this subject.

However, as to the second part of the proposal which works to restrict an organization's use of its own equipment, facilities, and personnel for First Amendment activities if such items were ever used on a grant and the costs properly allocated to that grant, the connection with any cost savings or economy to the government is more obscure. The duplication of

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facilities by contractor or grantee organizations which these restrictions may require if an organization wishes to engage in First Amendment advocacy and still receive contracts and grants, may in fact provide diseconomies to the government. The purpose of such a rule which would work in practice to prohibit the use of such items on First Amendment advocacy activities at any time is apparently related to the general goal stated in the OMB proposal to prevent even indirect "support of political advocacy" and to prevent government involvement in the private advocacy of ideas, regardless of cost or efficiency motives. Arguably, then, the "nexus" of this part of the proposal to a general statute with management, cost and efficiency purposes, particularly with no record or findings of cost savings established, would be more tenuous and questionable.

If the restrictions in the OMB policy are found to be burdensome, directly or indirectly, the exercise of First Amendment rights, then an even more specific grant of statutory authority, and more specific guidelines from Congress may be required than in cases such as AFL-CIO v. Kahn, *supra*, and Liberty Mutual, *supra*, where merely a rational "nexus" between the policy stated in the executive order and the purpose of a general statutory delegation was needed to be shown. A further significant distinction to note in this regard is that the actions challenged in both Kahn and Liberty Mutual were pursuant to a specific executive order issued by the President, while in the case of the OMB regulations this policy has been promulgated with no executive order on the subject. Case law has shown that the issuance of regulations which affect fundamental liberties, without express delegation of legislative authority nor under a lawful executive order, particularly where no hearings nor any record on the issue has been established, might be found to deprive persons of a fundamental liberty without due process of law. Kent v. Dulles, Secretary of State, 357 U.S. 116 (1958); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Haig v. Agee, 453 U.S. 280 (1981).

Considering the broad policy nature and purpose of the proposed restrictions; the existence of specific congressional enactments in this area, some with arguably contrary purposes to those stated by OMB; the potential effect of the OMB restrictions on fundamental liberties guaranteed by the First Amendment; and the absence of express congressional delegation of authority to OMB or a specific executive order on this subject, questions may be raised under judicial precedents as to whether an agency such as OMB, rather than the Congress or the President, is the proper "level" for promulgating such a policy. Hampton v. Mow Sun Wong, *supra* at 102-105, 114-117.

When the substantive prohibitions in the OMB proposal are contrary to or clash with express or implied authorization from Congress, for example, for program recipients to advocate for certain persons or groups, or to promote certain services or items, then the "express or implied will of Congress" authorizing such activity, evident in a statutory grant or its legislative history, would arguably take precedence over an OMB policy issued without express congressional delegation of authority. See Youngstown Sheet & Tube, *supra*.

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The proposal on its face deals with restrictions and regulation of private persons in the area of the exercise of First Amendment rights. The OMB proposal does not place a direct prohibition upon engaging in First Amendment activities. However, the Supreme Court has found that even indirect burdens on First Amendment freedoms which may result from governmental action may subject a regulation to a "critical" and exacting scrutiny since the "abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental actions". NAACP v. Alabama, 357 U.S. 449, 460-461 (1958). The impact on First Amendment rights which the financial requirements and the conditions on advocacy activities set as requisites for the receipt of federal monies within the proposal (see Speiser v. Randall, 357 U.S. 513 (1958)); Perry v. Sinderman, 408 U.S. 593, 597 (1972); note also Blitz v. Donovan, Secretary of Labor, 538 F. Supp. 1119 (D.D.C. 1982), vacated as moot, 51 U.S.L.W. 3507, January 10, 1983) may thus arguably subject such regulations to the traditional test of governmental burdens on First Amendment rights, that is, (1) that the government must demonstrate a sufficiently important or compelling governmental interest in the restrictions and (2) that the regulation on activity is narrow and precise and is sufficiently related to the stated governmental interest, that is, that the regulation is not overbroad. First National Bank v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 1, 14, 25 (1976); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

The significance of the governmental interest asserted in the proposal is difficult to assess because there have been no findings or record established of the specific abuses or harms at which the restrictions are aimed. The general governmental interest stated in the proposal, preventing the use of tax money to support private advocacy, if stated by the Congress or the President may arguably provide a significant governmental interest against which a court may weigh the burden on First Amendment rights arguably imposed by the requirements of the proposal. However, the sufficiency of this interest asserted by OMB may be diminished by the fact that neither the Congress by legislation nor the President by executive order has stated this interest on behalf of the government in relation to these regulations, and by the related fact that the express authority of OMB to "legislate" this policy in this area and assert this general interest is not apparent from any specific legislation. See Hampton v. Mow Sun Wong, *supra* at 105, 115-116.

The sufficiency of the interest asserted by OMB must also be measured against apparently contrary assertions by the Congress in numerous statutory schemes regarding both the direct and indirect subsidization of advocacy such as, for example, the use of public tax money to subsidize the advocacy of presidential candidates, tax provisions to exempt from federal income taxation nonprofit organizations who may engage in political advocacy, the indirect subsidization of certain nonprofit organizations by way of federal tax deductions to the contributors of such organizations which are allowed to "lobby" to a particular degree, as well as specific statutory schemes where Congress has appropriated money for programs to advocate for a certain segment of society such as the poor, the aged, consumers or minority groups. Additionally, the Supreme Court has noted our government's "profound national commitment to the principle that debate

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on public issues should be uninhibited, robust, and wide open", New York Times v. Sullivan, 376 U.S. 254, 270 (1964). The Court has specifically rejected a constitutional challenge to the use of tax money to support private political advocacy, by finding that there is no constitutional requirement of government non-involvement or neutrality in First Amendment advocacy, and holding that the challenged provision is a "use [of] public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." Buckley v. Valeo, supra at 92-93.

Both the interest of cost control in preventing the diversion of grant funds to unauthorized uses, and the interest of fairness in government contracting and the letting of grants, may be important governmental interests which might arguably be asserted by OMB, depending upon the statutory grant upon which OMB relies for its authority to issue such regulations. The question of overbreadth, however, may be particularly related to these stated interests. As to fairness in government contracting and the prevention of a "spoils system," there may arguably be "less restrictive means" of accomplishing this objective than barring all advocacy with any of an organization's equipment or supplies which had previously been used on, and costs properly allocated to, a federal grant or contract. See Shelton v. Tucker, supra at 489; Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637-639 (1975). The enforcement of rules and regulations requiring the selection of the most qualified bidder at terms most beneficial to the government, without regard to political bias, may arguably supply a less restrictive and more effective means of accomplishing this goal. It should also be noted that there are actually no rules or guidelines in this particular OMB proposal to prevent favoritism or a "spoils system" at which OMB claims the circular is aimed. Thus, grants and contracts could still be let to favored organizations which have enough private funding to be financially able to set up separate advocacy facilities, and the regulations therefore may arguably not be sufficiently related to this purpose stated as their justification. See Schaumburg, supra at 638; Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); NAACP v. Alabama, supra at 464. Similarly, the fact that the proposal may burden the use by a private organization of its own facilities for First Amendment activities, even when that particular use is proportionally paid for entirely out of private funds, may arguably not have a sufficient enough connection to the stated goal of cost control by preventing diversion of grant funds and the goal of preventing tax dollars to support advocacy, since no government grant funds are diverted nor tax dollars involved in such use. This part of the regulation may thus arguably be an overbroad restriction sweeping within its scope protected First Amendment activities not having a sufficient enough relationship to the stated governmental objectives and interests.

Questions may therefore be raised under a First Amendment analysis as to both the sufficiency of the governmental interest asserted by OMB in the restrictions, and as to the "overbreadth" of the application of the restrictions.

ANALYSIS OF POTENTIAL LEGAL ISSUES WHICH MAY BE RAISED CONCERNING OMB
PROPOSED AMENDMENT TO CIRCULAR A-122, REGARDING POLITICAL ADVOCACY
BY NONPROFIT GRANTEEES OF THE FEDERAL GOVERNMENT

This report discusses potential legal and constitutional issues which may be raised concerning the proposed amendments by the Office of Management and Budget to Circular A-122, "Cost Principles for Nonprofit Organizations", see 48 F.R. 3348-3351, January 24, 1983. The proposal deals with (1) the disallowability of the costs of a nonprofit grantee or contractor of the federal government for activities which are related to what OMB has characterized as "political advocacy", and (2) the disallowability of the proportional allocation of actual costs of an organization to a federal contract or grant for the organization's equipment, supplies, and facilities used on that contract or grant if such equipment, supplies and facilities belonging to the organization were used at other times for the organization's advocacy activities. Due to the timeliness of the issue, and the required response time, this report will provide an overview of only two legal issues which may arise concerning the proposal, in response to congressional inquiries on those two issues: (1) the authority of OMB to issue such regulations, and (2) First Amendment considerations involved in government regulation of political advocacy of private organizations.

The proposed amendments to the OMB circular specifically provide that: "The cost of activities constituting political advocacy are unallowable". (Proposed paragraph B 33 a.). This provision in the first instance would require that nonprofit organizations receiving federal grant or contract money from an agency or department of the federal government not use such

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money to pay for or support, nor allocate costs to a federal grant for, activities of the organization which fall within OMB's purview of "political advocacy". The term "political advocacy" is defined in the proposed amendments to include (1) an attempt to influence the outcome of any election, referendum or initiative at the state, local or federal level; (2) supporting, establishing, or contributing to a political action committee; (3) attempting to influence governmental activity by affecting public opinion; (4) attempting to influence governmental decisions through direct communication with members or staff employees of a legislative body, or of any agency participating in the decisionmaking process; (5) contributing to or participating in the expenses of any litigation except that in which the organization is a party with standing to sue or defend on its own behalf; (6) supporting or contributing money to an organization that has political advocacy as a substantial organization purpose or which spends \$100,000 a year on political advocacy. Activities which would not constitute political advocacy under the circular include (1) making available results of nonpartisan analysis, study or research the distribution of which is not primarily designed to influence an election or legislation; (2) providing technical advice or assistance to a governmental body or a committee or any subdivision of such upon the specific written request of the committee or body; (3) participating in litigation on behalf of others when such is the purpose of a grant or agreement; (4) applying or making a bid for a contract or grant; and (5) engaging in activities specifically required by law. (Proposed paragraph B 33 b. and c.)

In addition to the straight disallowance of advocacy costs, the proposal provides that a proportional part of the salary of an individual working on a federal contract or grant may not be allocated to that federal contract or grant if any other part of that person's duties for the private

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organization is to engage in "political advocacy", or if such person is required or "induced" to join or pay dues to an organization engaged in substantial political advocacy (other than a labor organization) or is required or induced to engage in political advocacy during non-working hours. The proposal also provides in effect that costs for items which a private organization uses in part for carrying out a federal contract of grant, such as costs for equipment, printing, and meetings, are not allowable or attributable to that grant if such items are used at other times for political advocacy (Proposed paragraph B 33 f.) Such restrictions would also apply to the organization's office space if more than 5 percent of that space is used at times for political advocacy (Proposed paragraph B 33 f (2)(a)).

OMB AUTHORITY TO ISSUE RESTRICTIONS

As discussed in more detail later in this report, the Supreme Court has held that Congress has a wide latitude to properly legislate restrictions on the use of funds that it appropriates, and may properly legislate certain narrow restrictions which may have an indirect burden on First Amendment rights when such provisions have a substantial relationship to the promotion of a sufficiently compelling governmental interest. In the context of the proposal under consideration, however, questions may be raised as to the authority of the Office of Management and Budget, as opposed to the Congress, to issue broad rules and restrictions which by their nature regulate and effect the political advocacy and other First Amendment activities of private, nonprofit organizations which receive federal grant or contract money.

Justice Rehnquist, writing for a unanimous Court in the case of Chrysler Corp. v. Brown, 441 U.S. 281 (1978) explained:

The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress . . . 441 U.S. at 302, and be reasonably within the contemplation of that grant of authority. 441 U.S. at 306.

In addition to statutory authority, arguments could be advanced that an executive action is based on an inherent authority of the President. However, as noted by Justice Jackson concurring in the opinion of Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952), overturning President Truman's seizing of private steel mills as unauthorized: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . ." 343 U.S. at 635-637. The United States Court of Appeals for the District of Columbia Circuit in the case of AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) stated that: "The Supreme Court has recently criticized the interpretations of appropriations measures as implied approvals of substantive administration action, see TVA v. Hill, 437 U.S. 153, 190 S.Ct. 2279, 57 L.Ed.2d 117 (1978), and much uncertainty attends any claim of "implied" or "inherent" presidential authority under the Constitution." 618 F.2d at 791-792, note 40, emphasis added.

Thus, the inquiry concerning the authority and validity of an executive agency regulation and rule will generally focus on whether there is a statutory grant of authority from Congress to that agency delegating to the agency Congress' legislative authority over the particular issue in question.

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As noted by the United States Court of Appeals in the case of Liberty Mutual Insurance Company v. Friedman, 639 F.2d 164 (4th Cir. 1981), ruling that affirmative action requirements of an Executive Order for private insurers of government contractors were beyond the executive's power as delegated from Congress in the general Procurement Act:

The question before us is not whether Congress could require [private] insurance companies providing worker's compensation insurance to federal contractors to comply with the affirmative action requirements of Executive Order 11,246, the question is "whether or to what extent Congress did grant . . . such authority" to the executive branch of government. See NAACP v. Federal Power Commission, 425 U.S. 662, 665, 96 S.Ct. 1806, 1809, 48 L.Ed.2d 284 (1976). 639 F.2d at 168.

No specific or express statutory grant of authority is cited within the OMB proposal which delegates legislative authority to OMB to issue regulations and restrictions regarding political advocacy and First Amendment activities of non-profit organizations who receive federal contracts or grants. Further research into federal law has similarly uncovered no express statutory grant of legislative authority to the Office of Management and Budget to issue rules and regulations concerning advocacy and First Amendment activities by nonprofit grantees and contractors of the United States Government or concerning the general principle of government non-involvement in private advocacy activities.

However, the inquiry does not end there. The Court of Appeals in the Liberty Mutual case, supra, stated that: "A congressional grant of legislative authority need not be specific in order to sustain the validity of regulations promulgated pursuant to the grant, but a court must 'reasonably be able to conclude that the grant of authority contemplates the regulations issued'." 639 F.2d at 169, citing Chrysler Corp. v. Brown, supra at 308. Thus, general

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grants of authority to OMB must arguably be examined to determine if such statutes contemplated the issuance of the regulations in question, that is, to determine if the proper "nexus" exists between the purpose of the regulations and the purpose of the statutory grant of authority, AFL-CIO v. Kahn, supra. If such a "nexus" exists the regulations may meet the requirement that executive power "must be exercised consistently with the . . . purposes of the statute that delegates that power." Id. at 793.

No general statutory authority was cited to by OMB in the issuance of the proposed amendments to Circular A-122, nor in the promulgation of the original circular. Several statutory provisions give OMB authority such as to review agency budget requests, prepare the budget, and to study, evaluate and develop plans for implementing better management, coordination, and organization in the executive branch of government with "a view to efficient and economical service" (31 U.S.C. § 18a, see Budget and Accounting Act, 31 U.S.C. §§ 1-24, note Reorganization Plan No. 2 of 1970); to issue guidelines to standardize the language used in government contracts and grants "to achieve uniformity in the use by the executive agencies of such instruments" (41 U.S.C. § 508, 501(b)) so as "to eliminate ineffectiveness and waste resulting from confusion over the definition and understanding of legal instruments used to carry out transactions" (S. Rpt. No. 95-449, 95th Congress, at 2); and to provide "overall direction of procurement policies, regulations, procedures and forms" through the establishment of the Office of Federal Procurement Policy within OMB (41 U.S.C. § 402(b)) to promote and improve "economy, efficiency, and effectiveness in the procurement of property and services by the executive agencies" (41 U.S.C. § 402(a), § 401).

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It is not clear precisely what statutory authority OMB relies upon for these restrictions such that a detailed analysis of the purposes of such statute could be provided herein. If general statutory authority such as described above is relied upon for the authorization of OMB to issue the regulations and restrictions in question then the required "nexus" with these statutes might arguably be the purpose of "economy and efficiency" in government contracts and grants, similar to the President's authority under the Procurement Act. In the case of AFL-CIO v. Kahn, *supra*, the United States Court of Appeals for the District of Columbia examined the general authority of the President under the Federal Property and Administrative Services Act (or Procurement Act) to issue an Executive Order, and for the Office of Federal Procurement Policy to implement that Order, to require that certain federal contractors be in compliance with the President's wage and price guidelines. (See E.O. 12092, 43 F.R. 51375 (1978), 43 F.R. 60772 (1978)).^{1/} The Court found that the goals of the Procurement Act "can be found in the terms 'economy' and 'efficiency' which appear in the statute and dominate the sparse record of the congressional deliberations" (618 F.2d at 788). The Court there concluded:

Because there is a sufficiently close nexus between those criteria and the procurement compliance program established by Executive Order 12092, we find that program to be authorized by the FPASA.

* * *

^{1/} Kahn differs from the case in question in two significant ways. In the first instance the challenged program in Kahn was initiated by an Executive Order issued by the President. Here, no Executive Order has been issued on the subject of political advocacy by non-profit organizations. Secondly, and related to the first distinction, the activities regulated in the proposal, unlike those in Kahn, relate to "fundamental liberties" such as those guaranteed by the First, Fifth, and Fourteenth Amendments (see Hampton v. Now Sun Wong, 426 U.S. 88 (1976)).

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Consequently we conclude that Executive Order 12092 is in accord with the "economy and efficiency" touchstone of the FPASA. By acting to restrain procurement costs across the entire Government the President was within his Section 205(a) powers.

We wish to emphasize the importance to our ruling today of the nexus between the wage and price standards and likely savings to the Government. . . . The procurement power must be exercised consistently with the structures and purposes of the statute that delegates that power. 618 F.2d at 792, 793

The required "nexus" between an executive order and the general authorizing statute (the Procurement Act) was found to be absent by the United States Court of Appeals for the 4th Circuit in the case of Liberty Mutual Insurance Company v. Friedman, *supra*. The challenged provisions in that case concerned affirmative action requirements for private insurance companies who were providing unemployment compensation insurance coverage to government contractors. The court noted that unlike a previous case cited there were no findings nor record established that the requirements of the executive order would be likely to produce savings to the Federal Government. The court found:

Assuming, without deciding, that the Procurement Act does provide constitutional authorization for some applications of Executive Order 11,246, we conclude that, in any event, the authorization could validly extend no further than to those applications satisfying the nexus test used in Contractors Association and Kahn. Applying that test here, we are satisfied that it is not met.

In applying the test, it is important first to note a respect in which the record before the Contractors Association court differed materially from that developed in this case to show the relationship between Procurement Act criteria and Executive Order application. In Contractors Association, but not in the instant case, there were factual findings in the record which tended to show a demonstrable relationship between the two which was not apparent from a consideration alone of the Act and the Order.

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Before the plan challenged in Contractors Association was implemented, a series of public hearings was held in the targeted area that resulted in administrative findings which reflected serious underrepresentation of minority employees in six trades. The mathematical disparity was found to be caused by exclusionary practices of trade unions rather than any lack of qualified minority applicants in labor pool. 442 F.2d at 164, 173. These findings buttressed the Contractors Association court's conclusion that the Executive was acting to protect the federal government's financial interest in the state projects thereby establishing the sufficiently close nexus sought by both the Contractors Association and Kahn courts. Cf. Fullilove v. Klutznick, U.S., 100 S.Ct. 2758, 2785-90, 65 L.Ed.2d 902 (1980) (Powell, J., concurring: importance of legislative findings of discrimination to sustain Act of Congress mandating affirmative action in federal grants for local public works projects).

By contrast, no such findings were made in the case before us. . . . The connection between the cost of workers' compensation policies, for which employers purchase a single policy to cover employees working on both federal and nonfederal contracts without distinction between the two, and any increase in the cost of federal contracts that could be attributed to discrimination by these insurers is simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives.

639 F.2d at 170-171.

In the OMB proposals under consideration, there were similarly no hearings, findings, nor record of abuses or waste of government funds in the area of political advocacy by private organizations receiving federal grants which purported to demonstrate the cost saving or increase in efficiency and economy to the government which would result from these restrictions. Since no record is apparent, the connection must therefore be on the face of the provisions relative to the stated purpose of the restrictions. Cost savings to the government were stated as a purpose or goal of these provisions in relation to preventing "diversion" of grant funds to political use. (48 F.R. 3349). Certainly, a restriction on the use of federal funds or restricting the allocation of costs to federal grants or contracts for

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non-authorized advocacy activity or any other activity when not in connection with the objectives of a federal grant or contract, that is, the diversion of grant funds, would arguably appear on its face to have cost saving and economy implications.

However, as to the general stated objective of the proposal, that is, to insure that the government is not subsidizing, directly or indirectly, any political advocacy, and in particular as to the provisions of the proposal which disallow any costs of an organization's facilities and equipment to be proportioned to their actual use on a government grant if at other times such facilities or equipment of the organization are used for First Amendment advocacy activities, the "nexus" to cost savings or economy objectives is more obscure. The savings to the government in preventing a private nonprofit organization from using its own equipment for advocacy if such equipment had ever been used on, and actual costs for such use allocated to a government grant, is not readily evident. The purpose of this part of the proposal does not appear to have any connection with nor does it appear to have been intended to have objectives of cost savings, economy, and efficiency of carrying out or implementing a particular government grant or contract.

Rather, the intent is apparently the achievement of the stated broad philosophical goal of government neutrality and non-involvement, through even the most indirect government "subsidy", in private advocacy. For example, if a grant were let to "promote" better health care facilities for the elderly, and the most efficient and economical method of obtaining that objective, from a practical and a cost benefit analysis standpoint, were actually to use resources to advocate more state, local, or federal funding for such facilities or to advocate for better regulation of such facilities as nursing homes, private clinics and the like, such activity would still be prohibited with grant funds under the circular. Thus, the purpose and the effect of the proposal would be

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to cease direct and even "indirect subsidies" to advocacy by private organizations under a grant or contract regardless of cost or efficiency considerations. Furthermore, as discussed later with respect to First Amendment considerations, the requirement of setting up separate advocacy facilities, personnel and equipment which the proposal would necessitate if organizations wished to exercise their First Amendment advocacy rights and still participate in government grants and contracts (48 F.R. 3350) may arguably provide severe diseconomies to the federal government because of the cost in the duplication of the facilities of its contractors and grantees.

It should be noted that the issue of whether Congress has delegated legislative authority to an agency may require an even more critical examination when, as here, the regulations in question may impact on protected First Amendment rights. The cases have found that when "fundamental liberties" such as those guaranteed by the First, Fifth and Fourteenth Amendments are involved, there is required even greater specificity and guidelines from Congress in its delegation to the agency, and any delegating language relied upon to affect those rights will be construed narrowly. In such a situation, particularly when general governmental policy is being made, the Court may look for express congressional delegation or an action pursuant to a specific, lawful Executive Order (Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), Kent v. Dulles, Secretary of State, 357 U.S. 116 (1958)). Without such express congressional delegation or action pursuant to an executive order, an agency regulation which burdens or restricts "fundamental liberties" such as First Amendment rights (particularly as in Hampton, supra and the circular in question where there is no record of hearings or consideration of the impact of the provisions, see 426 U.S. at 116) may be found to be a deprivation of "liberty" without due process of law (Hampton, supra at 102-103, Kent v. Dulles, supra at 129).

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The standards required for delegation of legislative authority from the Congress when First Amendment issues are at stake were expressed by the Supreme Court in Kent v. Dulles, supra:

Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. . . . [T]he right [involved] is a personal right included within the word "liberty" as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. Youngstown Sheet & Tube Co. v. Sawyer, supra. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted test. [citations omitted] Where activities or enjoyment, natural and often necessary to the well being of an American citizen. . . . are involved, we will construe narrowly all delegated powers that curtail or dilute them. See Ex parte Endo, 323 U.S. 283, 301-302. Cf. Hannegan v. Esquire, Inc. 327 U.S. 146, 156; United States v. Rumely, 345 U.S. 41, 46.

357 U.S. 1at 129

As to the required specificity and guidelines in delegations of authority, it should be noted that in the later case of Haig v. Agee, 453 U.S. 280 (1981), the Supreme Court found that despite a lack of express language delegating to the Secretary of State authority to "revoke" passports on national security grounds, the "broad rule-making authority granted in the [Passport] Act," 453 U.S. at 291, the specific authority in the Act for the Secretary to "grant and issue passports, and cause passports to be granted and issued, and verified in foreign countries" (22 U.S.C. § 211a (1976, Supp. III), 453 U.S. at 290), the "consistent administrative construction" of the Act (453 U.S. at 291), and the traditional role of the executive in the areas of foreign policy and national security (453 U.S. at 291) all lead to imply that the revocation of a passport on national security grounds by the Secretary "is 'sufficiently substantial and consistent' to compel the conclusion that Congress has approved it" (435 U.S. at 306).

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The proposed regulation on political advocacy by private nonprofit organizations issued by the Office of Management and Budget thus may require even a more critical scrutiny than those regulations examined under Khan and Liberty Mutual where merely a rational "nexus" was looked for between the executive order and the delegating statute of a general nature. When First Amendment activity is sought to be regulated there may need to be shown an express delegation of congressional authority and/or a specific executive order by the President under a proper delegation to him. Unlike the issues of delegations of authority looked to in Kahn and Liberty Mutual, the OMB provisions deal with First Amendment activity and were apparently not issued pursuant to a specific executive order on this subject. In certain circumstances, even where First Amendment rights are potentially involved, express delegation of congressional authority to perform the exact act in question may not be required if the general rulemaking authority of the agency delegated by statute is broad enough and the specific grants of authority (along with consistent administrative action and congressional recognition of the executive's role in such an area) indicate congressional approval of the action under some statutory grant of authority. It is not clear whether such statutory authority and delegation is present in the situation under examination.

Since the OMB circular states a general governmental policy and goal which has a national impact and application (non-subsidization and government non-involvement in private advocacy), ^{2/} and which may burden fundamental First Amendment rights, an executive agency such as OMB, without express congressional delegation of authority to the agency concerning the stated

^{2/} Expression of an arguably contrary goal and policy by Congress is discussed in section of this report on First Amendment issues concerning sufficiency of the stated governmental interest, pp. 24-29.

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goal nor a specific executive order evident, may arguably not be the proper "level" for promulgating or "legislating" such a policy. As stated by the Court in Hampton in overruling a Civil Service Commission regulation of citizenship requirements for public employment when neither the Congress nor the President had established such a policy:

Indeed we deal with a rule that deprives a discrete class of persons of an interest in liberty on a whole-sale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process.

* * *

When the Federal Government asserts an overriding national interest as justification for a [proposed] rule. . . , due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. That presumption would, of course, be fortified by an appropriate statement of reasons identifying the relevant interest. Alternatively, if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.

In this case the petitioners have identified several interests which the Congress or the President might deem sufficient to justify the exclusion of noncitizens from the federal service.

* * *

The difficulty with all of these arguments except the last is that they do not identify any interest which can reasonably be assumed to have influenced the Civil Service Commission, the Postal Service, the General Services Administration, or the Department of Health, Education, and Welfare in the administration of their respective responsibilities or, specifically, in the decision to deny employment to the respondents in this litigation. We may assume with the petitioners that if the Congress or the President had expressly imposed the citizenship requirement it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty

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negotiating purposes; but we are not willing to presume that the Chairman of the Civil Service Commission, or any of the other original defendants, was deliberately fostering an interest so far removed from his normal responsibilities.

426 U.S. at 102-105

The question of OMB authority to issue the restrictions and regulations on advocacy activity is most significant when the substantive rules in the OMB circular clash with or are apparently contrary to specific congressional enactments. This may be the case in situations where Congress has authorized programs to be funded to "advocate" for a certain segment of the population such as the poor, the handicapped, consumers or certain minorities, or to "promote" certain services or items, such as health care for the aged or the poor. (See, e.g., 42 U.S.C. § 6805; 42 U.S.C. § 9501; 42 U.S.C. § 3030d, see subsection (a)(10); 42 U.S.C. § 6012; 29 U.S.C. § 796f).

It should be noted that even when Congress has not expressly used the language "advocate" or "promote" it has been ruled by the Comptroller General of the United States that an organization may have been authorized by Congress by statutory language to engage in such advocacy activities. Thus, the Comptroller General found that the advocacy of the adoption of the Equal Rights Amendment by the Coordinating Committee of the National Commission for the Observance of International Women's Year was not an unlawful lobbying with federal funds by a federal agency and was appropriate activity under the statutory language:

The goals of the Conference, as enumerated in section 3(b) of Pub. L. 94-167, also seems to us quite consistent with the activities conducted by the Conference leaders. See particularly paragraph (5) of section 3(b) which directs the Conference to "identify the barriers that prevent women from participating fully and equally in all aspects of national life, and develop recommendations for means by which such barriers can be removed." Without expressing any opinion on its merits, it appears to

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us that a recommendation that the conference support the ratification of the ERA is a legitimate alternative in no way prohibited by the Statement of conference goals.

Opinion of the Comptroller General of the United States, S-182398, August 8, 1977, at 2. Emphasis in original.

The OMB proposal would by its terms exempt only litigation when it is the purpose of a grant, and advocacy activity "specifically required by law" (proposed Paragraph B33, c (3) and (5)), as opposed to all that activity authorized by Congress. Where the OMB restrictions and regulation of advocacy, not based on express delegation of authority from Congress, conflicts in this way with the "express or implied will of Congress", it may be argued, using Justice Jackson's analysis in the Youngstown Sheet and Tube, supra at 637), and therefore the express or implied congressional authorization to engage in such activities may arguably supercede the circular rules based neither on express congressional delegation of legislative authority nor a specific executive order (Youngstown Sheet & Tube, supra; Chrysler Corp. v. Brown, supra; see specifically 55 Comp. Gen. 911 (1976) where the Comptroller General characterized provisions of an OMB Circular, A-102, as "matters of executive branch policy which do not establish legal rights and responsibilities.")

It should also be noted that Congress has enacted legislation and appropriations restrictions in the past when it specifically desired that grant and/or contract funds should not be used for lobbying or propaganda purposes in specific situations. Such restrictions are placed by statute, for example, on the Legal Services Corporation to make sure that grants or contracts it lets are not used for unauthorized lobbying or political

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activities (42 U.S.C. § 2996(f)(a)(5)). Additionally, language included in yearly appropriations acts places lobbying restrictions on contract and grant money from three executive departments: Labor, Health and Human Services, and the Education Department. This restriction prohibits the use of contract or grant money "to pay the salary or expenses of any grant or contract recipient or agent acting for such recipient to engage in any activity designed to influence legislation or appropriations pending before Congress" (P.L. 97-92, Sec. 101(a)(2) incorporating by reference H.R. 4560, 97th Congress; see also P.L. 96-536, Sec. 101(a)(4) and P.L. 96-123, Sec. 101(g) incorporating by reference H.R. 4389, 96th Congress; and P.L. 95-480, Sec. 407). Thus, Congress has placed specific and narrow restrictions on the use of grant and contract funds when it has deemed such restrictions appropriate. This may arguably evidence Congress' determination on this issue, since no general, overall restriction, nor one with such broad application to all advocacy activities of grantees, has been adopted by Congress.

One final point should be examined as it applies to any implied "congressional consent" for the issuance of this circular by OMB under general statutory authorizations. It should be noted that the restricted "political advocacy" under the proposal would include contact by a nonprofit organization's personnel with a Member of Congress concerning pending, proposed or planned legislation if such communications may be interpreted as any attempt to influence a governmental decision (Proposed paragraph B33 a (4)). This may potentially curtail or limit the information, assistance and communication flow between Members of Congress and local nonprofit organizations who receive federal grants or contracts, even if the contact or request for assistance

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on proposed legislation or any governmental decisionmaking is initiated by the Member. The proposal exempts only: "Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision" (Proposed paragraph B33 c (2), emphasis added). Thus, if a Member wishes assistance, advice or ideas on a proposed piece of legislation from community action organizations or any community organization from his district, if such organization receives federal contracts or grants, such organization may possibly be restricted or limited in responding to the Member unless the Member has a committee or subcommittee chairman place a request for information from the organization in writing. Such a restriction upon a Member's access to information, assistance, suggestions, and expertise from organizations and groups within his district, or national groups as well, may provide further arguments that such restrictions were not consented to, intended, or implied in any general congressional delegation of legislative authority to the Office of Management and Budget.

FIRST AMENDMENT ISSUES

The restrictions contained in the proposal, dealing as they do with regulations upon political advocacy by private organizations who receive grants or contracts, operate by their nature in the area of the exercise of rights guaranteed by the First Amendment to the Constitution, that is, freedoms of speech, association and petition. In preliminary comments to the amendments to Circular A-122 the Office of Management and Budget stated its opinion that these restrictions will not infringe upon the First Amendment rights of recipient organizations:

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Recipients remain free to engage in political advocacy on any side of an issue. The proposals merely insure that organizations engage in political advocacy at their own expense - not the public's. If an organization chooses to exercise its First Amendment rights, it is only fair that it keep those political activities separate from its work at the expense of the public. It should not expect to have its political advocacy subsidized, or to be able to put facilities purchased in part by tax dollars to political use. 48 F.R. 3349, January 24, 1983.

If the proposals did in fact merely deal with a narrow congressional restriction on the use of contract or grant funds let from federal agencies to private nonprofit organizations, then the legal and constitutional implication would arguably not be significant. As a general rule and within certain constitutional limitations, Congress may place certain restrictions and conditions upon the use of funds it appropriates. The Supreme Court has noted the following general proposition: "That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321-322 (1937).

Concerning the proposal in question, however, the restrictions proposed are not limitations enacted by Congress in the legislative process, nor are they merely narrow restrictions on the use of funds received from the federal government. The intent and effect of the regulations have a far broader impact than merely disallowing non-authorized advocacy costs of an organization. Instead, the regulations may work in practice to restrict the use by private organizations of their own personnel, equipment, and office space for First Amendment activity if during some period such personnel or equipment were used in carrying out a federal grant or contract and the costs of such use were proportionally allocated to that contract or grant. For example,

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if a copying machine were used 5 percent of its time for a government grant project and 5 percent of its costs were thus allocated to the federal grant, the practical effect of the proposal would apparently be to restrict the organization from using this machine for any First Amendment advocacy activities the other 95 percent of its time even if all private, and no federal funds supported the costs of such advocacy. (See OMB explanation, questions and answers, 48 F.R. 3349, and Proposed paragraph B33 f(2)).

Such a restriction on the use of an organization's equipment, personnel and facilities would appear to have an impact on the First Amendment activities of an affected organization. The regulations may pose a particular burden on an organization with limited private resources which could not afford to purchase or lease new equipment, rent additional office space, and hire new personnel for its non-federal First Amendment advocacy or community action activities. If the organization attempted to assign the costs of new equipment, facilities and personnel entirely to the federal grant or contract, and pass the additional costs of duplicating such personnel and equipment on to the federal government, such additional cost considerations may place it at a poor competitive advantage in bidding for, proposing or seeking federal grants or contracts. (If such duplication is necessitated on a widespread basis by private nonprofit organizations generally, the costs to the government for grant or contract programs and studies may be significantly increased). The cost considerations of setting up duplicate facilities, and funding and administrative difficulties imposed on private organizations under these proposals may thus arguably present a burden on First Amendment advocacy activities. Similarly, the potential choice between seeking federal grant or contract money or exercising protected First Amendment activities which the proposal may necessitate may act to chill the exercise of such rights.

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The OMB proposal does not place a direct restriction or prohibition upon engaging in First Amendment activities by nonprofit organizations. Thus, it may be argued that any decision to forego political advocacy by such groups if they wish to participate in grants and contracts is merely an indirect restraint "resulting from self-censorship" (United States v. Harriss, 347 U.S. 612, at 626). However, it arguably may not satisfy the constitutional objections to say that if an organization wishes to continue to do advocacy activity and cannot afford to duplicate all of its facilities, equipment and personnel, then it could just not seek federal grants or contracts; or in the alternative if it wishes to have federal contracts or grants, then it must merely give up its advocacy activities. As a general proposition, it has been noted by the Supreme Court that: "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." Buckley v. Valeo, 424 U.S. 1, 49 (1976); see also Harper v. Virginia Board of Elections, 383 U.S. 633 (1966), re poll tax; Bullock v. Carter, 405 U.S. 134 (1972) re candidate filing fees. Similarly, the Supreme Court has held that the government may not condition the receipt of a government benefit upon the abdication of one's First Amendment rights. To do so would in effect allow the government to restrict indirectly speech and activity which it could not directly prohibit. (Speiser v. Randall, 357 U.S. 513 (1958); Perry v. Sinderman, 408 U.S. 593 (1972); see also Blitz v. Donovan, Secretary of Labor, 538 F. Supp. 1119 (D.D.C. 1982), vacated as moot 51 U.S.L.W. 3507, January 10, 1983). In the case of Perry v. Sinderman, the Court stated:

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[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

408 U.S. at 597

Although the provisions of the proposal are not a direct prohibition on First Amendment activity, the protection afforded public advocacy extends to potential restrictions by the government which operate indirectly upon persons and groups, as well as to those which place a direct prohibition or restriction on that activity. In the case of NAACP v. Alabama, 357 U.S. 449 (1958), the Supreme Court noted the "chilling effect" upon the "freedom to engage in association for the advancement of beliefs and ideas" that certain state actions may indirectly have:

Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, any State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

The fact that [the State] . . . has taken no direct action, (citations omitted), to restrict the right of petitioner's members to associate freely, does not end the inquiry into the effect of the production order. (citations omitted). In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action, (357 U.S. at 460-461; see Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 544 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960)).

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Public advocacy, participation in and discussion of governmental affairs and public issues, and the right to associate for such purposes have been found by the Supreme Court to "operate in the area of the most fundamental First Amendment activities". Buckley v. Valeo, 424 U.S. 1, 14 (1976). The Supreme Court in Buckley noted the following:

Discussion of public issues . . . are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to "the exposition of ideas," Winters v. New York, 333 U.S. 507, 510 (1948), "there is practically universal agreement that a major purpose of th[e] Amendment was to protect the free discussion of governmental affairs. . . ." Mills v. Alabama, 384 U.S. 214, 218 (1966).

424 U.S. at 14

The right to political advocacy, although fundamental, is not necessarily absolute. The Supreme Court has found, however, that a governmental burden upon that right must survive "exacting" and "critical scrutiny" and thus could be sustained only if the state "demonstrates a sufficiently important interest" (Buckley, *supra* at 25), and that such restriction "be closely drawn to avoid unnecessary abridgment" of the fundamental right of political advocacy. (First National Bank v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, *supra*; NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

Governmental Interest

As to the sufficiency of the governmental interest in the OMB proposal in comparison to the potential burden on First Amendment rights, it is difficult to assess the importance of preventing the precise abuses and harm at which the proposals are aimed, since unlike the established procedures in which Congress legislates such restrictions, there are no hearings, reports, nor findings connected with this executive fiat. Thus, there is no record established of particular abuses or harm to the government or the public at which the prohibitions are directed.

The explanatory material preceding the proposed amendments notes that the general goal of the circular is to prevent the federal government from subsidizing directly or indirectly the political advocacy activities of private organizations and to cease government involvement in the private advocacy of ideas. Such a general interest stated by Congress pursuant to findings in the legislative process, or even expressed in an Executive Order pursuant to the President's lawful authority, may arguably provide a court with a substantial governmental interest against which to balance the potential burden on First Amendment activities. However, the circumstances under consideration may mitigate against the compelling nature of the governmental interest asserted when such restrictions are issued by an agency of the government without hearings, record or specific findings on the issue, and not pursuant to express congressional findings and delegation of authority, nor pursuant to a specific Executive Order (see Hampton v. Mow Sun Wong, 426 U.S. 88, 103-105, 115-117 (1976)). The Court in Hampton v. Mow Sun Wong, *supra*, overturned a Civil Service Commission regulation regarding citizenship requirements for federal employment which was not based on an express congressional finding

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and delegation of authority, nor on an Executive Order. As to the sufficiency of the governmental interests asserted to overcome burdens on "fundamental liberties" guaranteed by the Fifth and Fourteenth Amendments, the Court stated:

We may assume with the petitioners that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized or possibly even as providing the President with an expendable token for treaty negotiating purposes; but we are not willing to presume that the Chairman of the Civil Service Commission, or any of the other original defendants, was deliberately fostering an interest so far removed from his normal responsibilities. Consequently, before evaluating the sufficiency of the asserted justification for the rule, it is important to know whether we are reviewing a policy decision made by Congress and the President or a question of personnel administration determined by the Civil Service Commission.

* * *

The Civil Service Commission, like other administrative agencies, has an obligation to perform its responsibilities with some degree of expertise and to make known the reasons for its important decisions. There is nothing in the record before us, or in matter of which we may properly take judicial notice, to indicate that the Commission actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other.

* * *

In sum, assuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission.

426 U.S. at 105, 115, 116

The sufficiency of the governmental interest asserted by OMB must also be evaluated in light of arguably contrary congressional and judicial determinations of governmental interests in this area. Thus, both the Congress and the Supreme Court have recognized an important governmental interest in encouraging, fostering, and even subsidizing the advocacy of ideas in the private sector. The Supreme Court has noted as a general concept our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (New York Times v. Sullivan, 376 U.S. 254, 270 (1964)), and has specifically upheld legislation to "use public money to facilitate and enlarge public discussion". . . . (Buckley v. Valeo, *supra* at 92-93.) The legislation adopted by Congress which was upheld by the Court in that case provided for public tax revenues to be distributed to private political campaigns to directly subsidize the political advocacy of presidential candidates. (See P.L. 92-178, § 801; P.L. 93-53, § 6; P.L. 93-443, §§ 403-408; 26 U.S.C. §§ 6096, 9001-9012, 9031-9042). Congress has further provided assistance and subsidies to private nonprofit organizations which may advocate in the general forms of exemption from federal taxation on the income and receipts of such organizations (see generally 26 U.S.C. § 501(c)); has provided incentives and indirect subsidies by way of tax deductions for individuals who contribute to certain nonprofit organizations which are allowed to engage in a designated amount of lobbying and "grassroots" lobbying activities (see 26 U.S.C. §§ 170, 501(c)(3), 501(h)), and has included such advocacy groups in the latest Federal United Way Campaign where federal employees, in federal buildings and on government time, participate in fund raising activities on behalf of such private nonprofit advocacy groups (see Executive Order No. 12353, March 23, 1982, and NAACP Legal Defense and Education Fund, Inc. v. Campbell, 504 F. Supp. 1365 (D.D.C. 1981)).

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The OMB proposal states the general principle that the government should not be involved in the advocacy of varying and competing private ideas by private parties, and that in using tax monies to directly or indirectly encourage or subsidize advocacy would force taxpayers to support ideas with which they may disagree. This argument, however, as a constitutional objection to government assistance to advocacy in the private sector has specifically been rejected by the Supreme Court in the case of Buckley v. Valeo, *supra*, in upholding the constitutionality of the federal financing of presidential political campaigns. As to the argument of preventing government "involvement" in private advocacy of ideas, which was argued something akin to the noninvolvement of the government in religion required by the establishment clause, the Court noted that there is no such noninvolvement or "neutrality" requirement as to First Amendment advocacy rights, other than religion:

Appellants next argue that "by analogy" to the Religion Clauses of the First Amendment public financing of election campaigns, however meritorious, violates the First Amendment. We have, of course, held that the Religion Clauses—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—require Congress, and the States through the Fourteenth Amendment, to remain neutral in matters of religion. E.g., Abington School Dist. v. Schempp, 374 U.S. 203, 222-226 (1963). The government may not aid one religion to the detriment of others or impose a burden on one religion that is not imposed on others, and may not even aid all religions. E.g., Everson v. Board of Education, 330 U.S. 1, 15-16 (1947). See Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961). But the analogy is patently inapplicable to our issue here. Although "Congress shall make no law . . . abridging the freedom of speech, or of the press," Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral

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process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values.

424 U.S. at 92-93

A lower federal court had earlier ruled in a different factual situation that the First Amendment did not prohibit the government from expending public monies on the advocacy of controversial issues.^{2/} Citing to a United States Court of Appeals case, Joyner v. Whiting, 477 F.2d 456, 461 (4th Cir. 1973) the District Court in the case of Arrington v. Taylor, 380 F. Supp. 1348, 1364 (D.N.C. 1974), stated:

More fundamentally, the notion that it is unconstitutional and somehow violative of the rights of individual members of society for a government to advocate a particular position is erroneous. . . . What is condemned by the free speech guarantee of the First Amendment is not advocacy by the government, but rather conduct which limits similar rights guaranteed to individual members of society.

A further objective of the ONB circular appears to be preventing a "spoils system" in government whereby organizations politically friendly to the current administration would receive the bulk of the contracts and grants. The OMB circular cites to the case of Elrod v. Burns, 427 U.S. 347 (1976), as justification for the sufficiency of this interest. It should be noted initially that the factual circumstances in Elrod v. Burns, *supra*, and the later related case of Branti v. Finkel, 445 U.S. 507 (1980), do not relate to advocacy by private organizations receiving government contracts or grants, but rather deal with the infringement of First Amendment rights of public employees subject to patronage dismissals when they do not possess the "proper" (*vis-a-vis* the

^{2/} See also General Accounting Office Opinion of September 10, 1976, B-130961-O.M.

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incoming administration) political party credentials. The advocacy restrictions in the OMB proposal are not limited to partisan political party activity or affiliation but extend even to nonpartisan First Amendment activity and the exposition of ideas and opinions on public issues. Most significantly, unlike the holding in Elrod v. Burns and Branti v. Finkel, the object of the OMB proposal is not to preserve government benefits regardless of the political or philosophic propensity of the recipient, but rather the impact may arguably be to cease funding those who exercise such rights of speech, expression and petition.

As discussed above, there are no findings or record provided by OMB of abuses regarding a "spoils system" or favoritism in contracts and grants which is sought to be rectified by these restrictions. However, if such abuses exist, strong arguments could be made that the prevention of such favoritism is a legitimate and important governmental interest. The major issue concerning the OMB proposal in relation to this stated interest, in addition to the issue discussed above as to the level of such policy making, may be the second part of the required First Amendment test, that is, the overbreadth doctrine.

Overbreadth

Even if a sufficient governmental interest were found within OMB's capacity to justify the burden on First Amendment rights, Supreme Court cases have shown that a further constitutional requirement is that restrictions in the area of First Amendment activities be narrow and not overbroad. The overbreadth doctrine requires that such regulations be drafted "precisely" and narrowly. As stated by the Supreme Court in United States v. Robel, 289 U.S. 250, 265 (1967): "It has become axiomatic that precision of regulation must be the touchstone in an area so

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closely touching our most precious freedoms". Thus, the Court will strike down provisions which broadly sweep within their restrictions both protected and unprotected speech and activity (NAACP v. Burton, *supra*; Aptheker v. Secretary of State, 378 U.S. 500, 512-513 (1964); Shelton v. Tucker, *supra*; Schaumburg v. Citizens for a Better Environment, 44 U.S. 620, 637-639; and where "less intrusive" (Schaumburg, *supra*) measures, that is, those which least interfere with rights of expression, are available. The Court in Shelton v. Tucker stated specifically:

In a series of decisions this Court has held that, even though the government purpose be legitimate and substantial, that the purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same purpose.

364 U.S. at 488

Finally, in relation to the overbreadth doctrine, the Court has insisted that there be a "substantial relationship" (Schaumburg, *supra* at 638) between the regulation on expression and the purported governmental interest asserted as its justification (See Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); NAACP v. Alabama, *supra* at 464; Buckley v. Valeo, *supra* at 25). In a practical sense, this may require the regulations to effectively deal with the purported problem and reason for their enactment.

If "fairness" in contracting and providing grants were the objective of the OMB circular, then significantly narrower guidelines, less obtrusive on First Amendment rights, might arguably be promulgated to enforce requirements that contracts and grants be let to the most qualified applicant in terms most favorable to the government, without regard to political bias. Barring all First Amendment activities of all nonprofit organizations with their own

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facilities and equipment if they were used at any time on a federal contract or grant and the costs of such use were allocated to that contract or grant, may arguably not be the "least restrictive means" of accomplishing the goal of "fairness" in contracting and grant letting. The regulations within the circular provide no rules or guidelines to insure "fairness" or equity in the grants or contracts that are let under the existent standards. Thus, larger nonprofit organizations with enough private resources to establish a separate advocacy branch, which are politically favorable to an administration or an agency, would not be prevented from receiving the bulk of the money and more favorable treatment under these provisions.

A further overbreadth issue may arguably arise in the context of the objective of preventing private organizations from being "subsidized" with government funds. If this were the objective, then regulations narrowly disallowing costs of unauthorized advocacy activity (that is where Congress has not authorized that funds be used to promote or advocate for a certain cause or objective) would arguably reach that objective. As now proposed, the regulations may work in a practical sense, by way of disallowing costs, to restrict groups from much advocacy with their own equipment and facilities even when the costs of that proportional use were, under proper cost accounting procedures, totally borne by private money. Thus, the regulations, since speech not funded by the federal government may be restricted, might arguably sweep within its prohibitions protected speech and activity, unrelated to the stated objectives of the circular.

Vagueness

A principle of First Amendment regulation somewhat akin to the overbreadth doctrine is the "vagueness" doctrine which requires specificity in First Amendment restrictions so that protected conduct will not be deterred

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by questions of the applicability of vague and unclear prohibitions. (See Smith v. Goguen, 415 U.S. 566 (1974); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Young v. American Mini Theatres, 427 U.S. 50 (1976)). Thus, the definitions employed by OMB for "political advocacy" may need to be examined for their potential impact on First Amendment activity. "Political advocacy" is defined broadly to cover not only partisan political activities, but also to nonpartisan discussions and advocacy on public issues, and to such things as nonpartisan community action and legal representation of another. The restriction might also reach and encompass consultations and information sharing with local community leaders to share common concerns, and with other nonprofit groups that do advocate. Many questions may thus arise concerning a group's liaison activities with other nonprofit groups, with other units or subgroups of its own organization engaged in advocacy, and with community governmental units seeking solutions to local and regional issues, as well as questions about attending meetings and forums where possible solutions to problems are discussed, as to whether such activity and community involvement would constitute restricted "advocacy". In addition to the practical effect of adversely affecting the effectiveness of local groups who may be cut off from community involvement, the restrictions imposed by the financial requirements, and the breadth of the restrictions and the concurrent questions that they raise may arguably chill protected First Amendment activities of covered private, nonprofit organizations participating in federal grants or contracts. If this were the case, narrowing and explanatory guidelines may be required.

CONCLUSION

The exercise of legislative power is vested in the Congress, and legislative functions may be exercised by an executive agency only insofar as the authority to do so is delegated to the agency by Congress. Generally, if no express delegation to act on a particular subject is apparent, the courts will look to determine if the purposes of an executive rule, regulation or other promulgation may rationally be within or have a "nexus" to the purpose of a general statutory delegation of authority to the agency.

There is no clear indication of an express statutory delegation of authority from Congress to the Office of Management and Budget to issue rules and regulations regarding political advocacy by nonprofit organizations which receive federal grants, nor to establish rules to effectuate a general governmental policy of non-involvement and non-subsidization of advocacy in the private sector. Insofar as the cost accounting and allocation rules of the OMB proposal prohibit a grantee from allocating to a federal grant the costs of unauthorized advocacy activities, or any advocacy activities unrelated to the purposes of a grant, such prohibitions on diversion of grant funds may arguably come within some general delegation of statutory authority to OMB under a statutory provision which has grant management, or cost and efficiency purposes, depending on which statute OMB cites to as providing such general statutory authority.

However, as to the provisions of the proposal which work to restrict an organization's use of its own equipment, facilities, and personnel for First Amendment activities if such items were ever used on a grant and the proportional costs allocated to that grant, the connection with any cost savings or economy to the government may be more obscure. The duplication of facilities by contractor or grantee organizations which these

restrictions may require, may in fact provide diseconomies to the government. The purpose of such a rule which would work in practice to prohibit the use of such items on First Amendment advocacy activities at any time is apparently related to the general goal stated in the OMB proposal to prevent even indirect subsidization of an organization which advocates and to prevent government involvement in the private advocacy of ideas, regardless of cost or efficiency motives.

Since the restrictions in the OMB policy may effect the exercise of First Amendment rights, an even more specific grant of statutory authority, and more specific guidelines from Congress might be required than in cases such as AFL-CIO v. Kahn, supra and Liberty Mutual, supra, where merely a rational "nexus" between the policy stated in an executive order and the purpose of a general statutory delegation was needed to be shown. It is also significant that the actions challenged under both Kahn and Liberty Mutual were pursuant to a specific executive order issued by the President, while in the case of the OMB regulations no executive order has been issued on this subject. The issuance of regulations on fundamental liberties without express delegation of legislative authority or under a lawful executive order, particularly where there were no hearings nor any record on the effects of the provisions and issues in question, may in some instances arguably deprive persons of a fundamental liberty without due process of law.

Considering the broad policy nature of the proposed restrictions, the stated purpose of those restrictions, their affect on fundamental liberties, and the absence of express congressional delegation of authority or a specific executive order on this subject, questions may be raised under

judicial precedents as to whether an agency such as OMB, rather than the Congress or the President, is the proper "level" for promulgating such a policy decision.

A significant issue related to OMB's authority to issue these restrictions arises when the substantive prohibitions in the OMB proposal are contrary to or clash with express or implied authorization from the Congress for program recipients to advocate for certain persons or groups or promote certain items. When this is the case it would appear that the express or implied will of Congress, evident in a statutory grant or legislative history, would arguably take precedence over an OMB policy issued without express congressional delegation of authority.

The question of OMB authority to promulgate broad governmental policy in this area reflects also on the First Amendment issues. The impact on First Amendment rights which the proposal may have in practice may arguably subject such regulations to the traditional test of governmental burdens on First Amendment rights, that is, that the government must demonstrate a sufficiently important or compelling governmental interest which is promoted by a narrow and precise regulation on First Amendment activities.

The general governmental interest stated by the proposal, government non-subsidization of and non-involvement in private advocacy, if stated by the Congress or the President may arguably provide a sufficient governmental interest to justify the burden of First Amendment rights imposed by the requirements of the proposal. However, the sufficiency of the interest asserted may be diminished by the fact that neither the Congress nor the President has expressly stated this interest in relation to the regulations, and the fact that the express authority of OMB to "legislate" in

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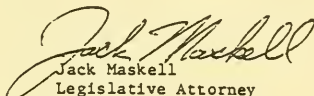
this area and assert this general interest is not apparent on the face of any specific legislation. The sufficiency of the interest of the government as asserted by OMB must also be measured against apparently contrary assertions by the Congress in numerous statutory schemes where, for example, public tax monies are made available to private parties for their political advocacy, and where Congress has established tax provisions to exempt nonprofit groups which advocate from federal income taxation, and to subsidize contributions to certain nonprofit groups which are allowed to lobby to a particular degree. Further, the Supreme Court has found that government neutrality and non-involvement in private advocacy is not constitutionally required and has upheld the financing of private political campaigns with tax revenues as a proper "use [of] public monies to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people" (424 U.S. at 93).

The interest of fairness in government contracting and the letting of grants may be an important governmental interest which may arguably be asserted by OMB. The question of overbreadth, however, is particularly relevant to this stated interest, since there may arguably be less restrictive means of accomplishing this objective than barring all advocacy with any of an organization's equipment or supplies which had previously been used on, and costs proportionally allocated to, a federal grant or contract. Rules and regulations requiring the selection of the most qualified bidder at terms most beneficial to the government without regard to the political bias of the organization may arguably supply a less restrictive and more effective means of accomplishing this goal. It should also be noted that there are actually no rules and guidelines in this particular

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OMB proposal to prevent favoritism or a "spoils system" at which OMB claims the circular is aimed. Thus, grants and contracts could still be let to favored organizations which have enough private funding to be financially able to set up separate advocacy facilities. Finally, the fact that the proposal may burden the use by an organization of its own facilities for First Amendment activities even when that particular use is proportionally paid for entirely out of private funds, may arguably not have a sufficient enough connection to the stated goal of non-subsidization of advocacy and arguably be an overbroad restriction sweeping within its scope protected First Amendment activities.

Thus, questions may be raised under a First Amendment analysis as to both the sufficiency of the governmental interest asserted by OMB in the restrictions, and as to the "overbreadth" of the application of the restrictions.


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USE OF FEDERAL CONTRACT OR GRANT MONEY FOR LOBBYING PURPOSES

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USE OF FEDERAL CONTRACT OR GRANT MONEY FOR LOBBYING PURPOSES

This report discusses the propriety of using federal contract or grant money by private recipients for the purposes of lobbying the United States Congress.

Initially it should be noted that there is within federal law a criminal prohibition, as well as yearly appropriations restrictions,^{1/} against the use of federally appropriated funds for the purpose of lobbying the Congress. There is, however, no clear indication from the legislative history of the criminal statutory provision, nor the judicial or administrative interpretations of either provision, that such prohibitions would reach private individuals using monies under their control which have been received by way of federal contracts or grants. These general prohibitions on lobbying with appropriated funds apparently go to "executive branch" or "administrative lobbying" by the federal agencies and their officers and employees who use congressional appropriations to their agencies for the prohibited purposes, rather than attaching to private parties who do not receive appropriations from Congress but who receive contract or grant funds from United States departments and agencies. Indeed, the criminal prohibition on lobbying with appropriated funds, at 18 U.S.C. § 1913, by the specific language of

^{1/} See 18 U.S.C. § 1913; and Treasury Postal Service and General Governmental Appropriations Act, e.g., P.L. 97-51, P.L. 97-85, P.L. 97-92 and P.L. 97-161 continuing appropriations as established in H.R. 4121, 97th Cong., see Sec. 608(a); P.L. 96-369 and P.L. 96-536 continuing appropriations as established in H.R. 7583, 96th Cong., see Sec. 607(a); P.L. 96-74, Sec. 607(a); P.L. 95-429, Sec. 607(a).

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the provision, applies its penalties only to an "officer or employee of the United States or of any department or agency thereof".

There appear to be no specific requirements under federal law that instruct all agencies as a matter of course to seek prior contractual assurances that funds they make available to private parties by way of procurement or services contracts or grants will not be used by such private parties for lobbying or propaganda purposes. However, there may be either statutory or appropriations language, or specific "strings" attached to a particular contract or grant, which could place restrictions on lobbying upon those funds made available to private contractors or grantees through particular federal programs or from certain federal departments or agencies.^{2/} Additionally, in some circumstances, such as where an agency is involved in funding a continuing joint government-private industry project or other activity where continued government approval, participation or endorsement is indicated, and the agency is aware of propaganda activities by the private parties with contract or grant funds, an agency may arguably have some responsibility concerning its continued funding of those activities to prevent a violation of the general anti-lobbying provisions from being imputed to the agency.^{3/}

^{2/} See 42 U.S.C. § 2996f(a)(5) re grantees and contractors of the Legal Services Corporation; and Labor, Health and Human Services and Education Departments Appropriations acts, e.g., P.L. 97-92, Sec. 101(a)(2) incorporating by reference H.R. 4560, 97th Cong.

^{3/} See Report of the Comptroller General of the United States: "Problems With Publications Related to the Clinch River Breeder Reactor Project", B-130961, January 6, 1978; Comptroller General Opinion, B-128938, July 12, 1976.

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Specific Restrictions on Grantees or Contractors

As noted above, there may be specific statutory or appropriations language against the use of particular contract or grant money for lobbying or advocacy purposes. In such a case the affirmative responsibility might rest with the federal agency or bureau letting the contract or grant. For example, in the case of the funds made available by contract or grant by the Legal Services Corporation, a specific statutory provision requires that the Corporation insure that such funds are not used for lobbying purposes by the recipient organization (42 U.S.C. § 2996f(a)(5)):

§2996f. Grants and contracts

(a) Requisites.

With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this subchapter, the Corporation shall--

(5) insure that no funds made available to recipients by the Corporation shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any executive order or similar promulgation of any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies

Specific language included in yearly appropriations acts places lobbying restrictions on contract and grant money from three executive departments: Labor, Health and Human Services, and the Education Department. This restriction prohibits the use of contract or grant money "to pay the salary or expenses of any grant or contract recipient or agent acting for such recipient to engage in any activity designed to influence legislation or appropriations pending before Congress" (P.L. 97-92, Sec. 101(a)(2) incorporating by reference H.R. 4560,

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97th Congress; see also P.L. 96-536, Sec. 101(a)(4) and P.L. 96-123, Sec. 101(g) incorporating by reference H.R. 4389, 96th Cong; and P.L. 95-480, Sec. 407). This language is somewhat narrower than the Legal Services Corporation prohibition, as this appropriations restriction goes only to the use of contract or grant funds to lobby the United States Congress, while the Legal Services Corporation statute goes to the use of funds to lobby state or local legislatures, or to lobby on executive orders or similar promulgations of any federal, state or local agency, as well as on legislation before Congress.

The Comptroller General of the United States has interpreted the provision of the Labor/HHS Appropriations Act to restrict contract and grant recipients from expending funds received from a federal contract or grant from one of the designated departments for "grass roots" lobbying activities, that is, for "an indirect attempt to influence pending legislation by urging members of the public to contact legislators to express support of, or opposition to the legislation or to request them to vote in a particular manner." (Decision of the Comptroller General, B-202787, May 1, 1981, at p. 1, citing to definitions of grass roots lobbying in 56 Comp. Gen. 889 (1977) and 59 Comp. Gen. 115 (1979)). The Comptroller General in that decision instructed an agency of the federal government to investigate a mass mailing of material to the general public by a Department of HHS grantee which urged readers to write their congressman for support of a program, to determine "if any Federal funds were utilized either

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directly, for such items as postage, stationary or employee salaries, or indirectly, for such items as office machinery use, utilities etc." in such mailings (Id. at 3).

Although there are specific restrictions on contract or grant recipients from certain agencies or departments, such as the ones noted above, no statutory or appropriations provision of general applicability to all federal contract or grant money has been found.

General Restrictions on Appropriated Funds

There is, as discussed briefly above, a general, overall restriction on the use of "appropriated" funds for the purposes of lobbying the Congress. The language of the criminal statutory provision, at 18 U.S.C. § 1913, states broadly that "No part of the money appropriated by any enactment of Congress shall ... be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter or other device intended or designed to influence" Members of Congress on legislation. However, the penalties provision of this statute clearly demonstrates that the penalty for such conduct applies only to "an officer or employee of the United States or of any department or agency thereof".^{4/} Thus, the penalties under this statute for the use of federal funds for lobbying would not follow such funds to apply to a private contractor or grantee. The statute states as follows:

^{4/} A federal department and a private organization receiving funds from that department were named as defendants in a civil suit brought to enjoin the expenditure of federal funds for lobbying under the criminal provision at 18 U.S.C. sec. 1913. National Association for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973). The court there held that despite the language of the criminal statute making it applicable only to "an officer or employee of the United States", the private organization may be named as a defendant in a civil suit brought under the criminal provision. 356 F. Supp. at 1402-1404. That case, however, was expressly overruled by the district court in its decision of NTEU v. Campbell, 482 F. Supp. 1122 (D.D.C. 1980), affirmed 654 F. 2d 784, 789-790 (D.C. Cir. 1981). See also (cont'd)

§ 1913. Lobbying with appropriated moneys

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business. -

Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than \$500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

June 25, 1948, c. 645, 62 Stat. 792.

The legislative history and the subsequent interpretations of the statutory provision at 18 U.S.C. § 1913 demonstrate that the prohibition was intended to restrict federal officials from using appropriations to engage in a publicity campaign directed at the general public to stir the public to contact their Congressman on a particular issue. The intent of the statute was stated by the original sponsor of the provision, Congressman James W. Good of Iowa, on the floor of the House on May 29, 1919:

^{4/} (cont'd) American Conservative Union v. Cartar, No. 79-2495, slip op. at 4-5 (D.D.C. December 14, 1979).

It is new legislation, but it will prohibit a practice that has been indulged in so often, without regard to what administration is in power -- the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. The gentleman from Kentucky, Mr. Sherley, former chairman of this committee, during the closing days of the last Congress was greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to wire Congressman Sherley for this appropriation and for that. Now, they use the contingent funds for that purpose, and I have no doubt that the telegrams sent for that purpose cost the Government more than \$7,500. Now it was never the intention of Congress to appropriate money for this purpose...." (58 Congressional Record 403, May 29, 1919).

Subsequent interpretations of this provision have also focused on what has been called "executive branch lobbying" by federal officials who use appropriations to sponsor publicity, propaganda, or "grassroots" type lobbying campaigns directed to the public that specifically urge or are designed to have persons contact their Representative or Senator in Congress on a particular issue. (See, for example Hearings on Legislative Activities of Executive Agents, House Select Committee on Lobbying Activities, 81st Congress, 2d Session, 1950; letter opinion from Assistant Attorney General Henry J. Miller, 1962, in 108 Congressional Record 8449-8451, May 15, 1962; letter opinion from Assistant Attorney General Henry S. Peterson to Senators Humphrey

and Muskie, July 19, 1973^{5/}; see also American Public Gas Association v. Federal Energy Administration, 408 F. Supp. 640 (D.D.C. 1976.)

In the case of contracts or grants, the statutory prohibition would therefore apparently apply where a federal official uses appropriated funds to contract with or provide a grant to a private party for the performance of certain "lobbying" services or activities directed at Congress for the federal agency or official. In such a case the prohibition would be focused on the use of funds appropriated by Congress for the agency, and the penalties for the improper use of such funds would be applicable to the federal officials involved in letting that contract or grant. However, where an agency lets a contract or gives a grant to a private party for a legitimate, non-lobbying purpose, such as for supplies, equipment, studies or other services, and the private contractor or grantee on its own accord uses the funds under its control, received from the government contract or grant, for lobbying purposes, then it would appear that no misuse of "appropriated" funds by a "federal officer or employee" would have occurred under 18 U.S.C. § 1913.

The yearly appropriations restriction, which is generally enacted as Section 607(a) of the annual Treasury, Postal Service and General Appropriations Act,^{6/} and which prohibits the use of funds appropriated

^{5/} Copy available from Congressional Research Service files.

^{6/} The Treasury, Postal Service and General Governmental Appropriations Act, 1982, H.R. 4121, 97th Cong., as incorporated by reference in the continuing appropriations acts P.L. 97-51, 85, 92 and 161, sets out the "propaganda and publicity" restriction at Sec. 608(a).

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by Congress for "propaganda or publicity" purposes designed to influence Members of Congress, is interpreted in a similar manner as the criminal statute. (See 59 Comp. Gen. 115, 117 (1979): "Our construction of section 607(a) was greatly influenced by the legislative history and judicial construction of the anti-lobbying penal statute, 18 U.S.C. § 1913...."). That is, the provision, like § 1913, is interpreted "to prohibit Government officials from making appeals to the public to in turn contact their representative with respect to legislation, but not to prohibit agency officials from expressing their views and agency policy on pending legislative and appropriations matters." (Id. at 118)(Emphasis added). The Comptroller General has explained:

In construing provisions such as section 607(a), it is important to recognize that an agency has a legitimate interest in communicating with the public and with legislators regarding its policies. It has been our position that the prohibition of section 607(a) applies primarily to expenditures involving direct appeals to the public suggesting that they contact their representatives and indicate their support of or opposition to pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. (General Accounting Office Memorandum, B-130961.140 - O.M., September 10, 1976, p. 9; also Decision of the Comptroller General, B-128938, July 12, 1976, p. 5; 56 C.G. 889; Decision of the Comptroller General, B-164497(5), August 10, 1977, p. 3).

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Under this appropriations restriction, similar to the criminal statute, an agency could not do indirectly by contracting out what it would be prohibited from doing directly by itself. An agency would therefore be prohibited from contracting with or giving a grant to a private firm or individual for supplying services or items which are intended or designed to influence Members of Congress concerning pending legislation, just as it would be prohibited from using appropriations to pay for salaries of its own employees, or equipment and supplies, for use in such activity.

It would appear to be an impractical and unreasonable interpretation of the statutory prohibition or the appropriation restriction, however, to attempt to follow the disbursement of all funds initially appropriated by Congress to their ultimate destination to apply the lobbying prohibitions to such funds since, in addition to contracts and grants, funds are appropriated to federal agencies and then disbursed as salaries, welfare payments, pensions, social security payments, disability payments and numerous other distributions. Once these funds appropriated by Congress to the agencies are so disbursed by the federal government and are under the control of private individuals, it would appear that the general prohibitions on lobbying with appropriated funds would no longer apply unless specific restrictions to that end were included in a particular contract or grant, or in a specific statute or appropriation. The fact that specific statutory and appropriation restrictions have been adopted limiting the use of particular contract or grant funds by private recipients for lobbying purposes apparently evidences a congressional determination that the existing law, absent such specific restrictions on particular grant or contract money, would not otherwise reach the use of such funds by private recipients.

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Agency Responsibility for Contractor or Grantee Conduct

Although the general lobbying restrictions would not appear to apply directly to the private parties receiving contract or grant funds, questions may arise concerning an agency's responsibility when a private individual or firm is contracted to perform, for example, general informational services, and in the course of performing its government contract uses contract funds to engage in lobbying activities directed at federal legislation. In such circumstances, the Comptroller General of the General Accounting Office, who is empowered to oversee the use of appropriated funds and to move to recover funds improperly used, might look to the degree of agency involvement, control, or approval of such activity, or the appearance of such approval or sponsorship, versus the independent and private activity of a private contractor or grantee of the federal government.

In decisions of the Comptroller General where private parties under contract to the United States were alleged to have been involved in lobbying activities, the Comptroller General appeared to look to determine if the use of federal contract money by the private contractor implied governmental or federal agency support or authorization for such activities. Thus, where a federal agency and a private organization were undertaking a joint project such that the United States Government would be identified with any activity of the joint project participants, the Comptroller General implied that a federal agency should take steps to assure that federal monies made available by way of contracts to the private organization in the joint project are not used for lobbying or propaganda

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activities. In the Report of the Comptroller General of the United States on "Problems With Publications Related to the Clinch River Breeder Reactor Project", B-130961, January 6, 1978, the Comptroller General suggested that in such circumstances, where the U.S. would be identified with the joint activities, contractual provisions barring such use of funds may be inserted in government contracts. In the particular instance under consideration there, relating to the Clinch River Breeder Reactor (CRBR), however, such a solution could not be implemented since only private funds were used in issuing the offending "propaganda" material. As noted in the Comptroller General Report: "DOE has no contractual authority to stop their issuance because, as allowed under the CRBR contracts, BRC paid for them out of utility contributions and no federal funds were involved" (Id. at 2).

However, since, in the case of the Clinch River Breeder Reactor project, a federal agency's involvement in an activity was to such an extent that United States Government approval or sponsorship of project related activities were implied, the Comptroller General suggested that, even if no federal monies were involved in the offending promotional activity, the agency take steps to assure the impartiality of the material or to make a clear disclaimer on behalf of the government. The Comptroller General stated specifically that where "the public correctly views a joint DOE/industry R&D project such as the CRBR as a Government-sponsored project" and where "the public will tend to identify this information with the Government and is likely to view it as bearing the Government's seal of approval", then the federal agency should "exercise some responsibility", even though public funds were not used, "for seeing to it that the public and its elected representatives

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receive balanced and objective information" from the industry participants in the joint project concerning "project-related" informational material. The Comptroller General suggested that where promotional literature by the private organization in a joint project with the government does not meet certain standards of fairness that a disclaimer should be prominently displayed making it clear that "the publications are not Government approved" (Id. at 2).

Similarly, in a 1976 opinion, the Comptroller General found that where an agency is involved in funding by contract continuing activities of a private organization for the government, and in performing those activities the organization uses contract funds for propaganda or lobbying activities that imply government sponsorship or endorsement, then the agency has a responsibility to prevent such use of funds in the future. (See Opinion of the Comptroller General of the United States, B-128938, July 12, 1976). It is not clear under this opinion whether the agency must assure that the private organization not use any contract funds for lobbying purposes in the future, or whether the agency may merely assure, by way of disclaimer, that the activities of the organization are clearly identified and perceived as those of the private party and not approved or endorsed by the government. The opinion does state, however, that an appropriate solution should "include" review of publications of the private organization which are funded by government contracts and "the use of appropriate disclaimer language" (Id. at 7), thus implying that such disclaimer would satisfy the appropriations restriction.

This opinion dealt with a series of publications by a private organization funded through contract agreements with the Environmental

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Protection Agency under Purchase Order P5-01-2958-A." One of the issues of the newsletter published contained an article urging readers to contact their congressman on a particular piece of legislation.

The Comptroller General's opinion stated:

It is likely that this article, if published directly by EPA, would constitute a violation of section 607(a). B-178648, September 21, 1973. The question here, however, is whether the violation may be imputed to EPA where the article was published and distributed, not by EPA, but by the Foundation under an otherwise proper contract.

* * * *

As noted above, there was no requirement for prior approval by EPA of each newsletter. However, each newsletter was required to be distributed to all Regional Public Affairs Directors and to the Project Officer. Thus, EPA knew, from its receipt of the October 1975 issue, that the Foundation was using an approval statement implying official Government sanction of the contents of the newsletter. In the circumstances presented, we believe that EPA had a duty to insure that its appropriation was not used in a manner that would violate section 607(a)

Since similar newsletters have been or are being prepared by other contractors under the Water Quality Information Exchange Program, and since similar programs might be undertaken in the future, EPA should establish adequate procedural safeguards to assure that appropriated funds are not used in connection with activities which contravene statutory prohibitions against "publicity or propaganda." These procedures should include, but are not necessarily limited to, prepublication review by EPA of newsletters and the use of appropriate disclaimer language. (Id., at 6-7).

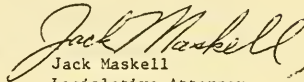
Thus, private individuals or organizations are apparently not themselves constrained by existing statutory or appropriations restrictions of general application from using funds under their control, which were received by way of a government contract or grant, for the purpose of lobbying, propaganda or publicity concerning

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legislation pending before Congress. In some instances specific statutory or appropriations language will restrict the use of particular contract or grant money for lobbying purposes, such as in grants or contracts from the Legal Services Corporation, and from the Departments of Labor, HHS, and Education. All agencies of the federal government, however, do not appear to be required as a matter of general policy to police the use of all contract or procurement funds it lets out, or to place within all contracts or grants clauses which restrict the use of such funds to non-lobbying purposes by the private recipient/contractors. However, the general appropriations restriction may arguably, under certain circumstances, place a responsibility on a federal agency concerning funds that it is letting out by contract or grant on a continuing basis for certain services or activities by private organizations. Such a situation may arguably arise where an agency and a private party are involved in a continuing relationship involving the federal funding of activities which indicate joint government participation, or government approval, sponsorship or endorsement of the particular activities. Where the federal agency is aware of the propaganda or lobbying activities engaged in by the private contractor or grantee with contract or grant funds under these circumstances, and is aware of the implication of government approval, sponsorship, or endorsement of such activities, but the agency continues to fund such activities through the contractor or grantee, then a violation of the anti-propaganda appropriations restriction might arguably be imputed to the federal agency for its "tacit approval" of the continued use of its appropriations in this manner. In these

CRS-16

circumstances, it is possible that the General Accounting Office might require that an agency cease funding those activities, assure that its funds will not be used by the contractor or grantee for such purposes in the future, or assure by way of disclaimer that the activities are perceived and understood to be merely those of a private party which are not approved or endorsed by the United States Government.


Jack Maskell
Legislative Attorney
American Law Division
October 1, 1982

APPENDIX 3.—STATEMENTS AND LETTERS REGARDING OMB CIRCULAR A-122

Statement of the Honorable
JAMES M. JEFFORDS
on
COST PRINCIPLES FOR NONPROFIT ORGANIZATIONS
before the
Subcommittee on Legislation and National Security
March 1, 1983

On January 28, 1983, the Office of Management and Budget (OMB) published in the Federal Register a proposed revision to Circular A-122, "Cost Principles for Nonprofit Organizations." The same revision would be applied to all federal contractors and grant recipients.

This revision would severely and improperly curtail the ability of non-profit and for-profit grantees and contractors to communicate with their local, state and federal governments.

The OMB has announced its intention to withdraw and revise its proposed revision. I applaud this decision, and hope that the authors of the new proposal will take care to avoid the many shortcomings of the original.

OMB makes essentially four arguments in support of the current revision. First, it contends that the government should not subsidize the political activities of private groups or institutions. Second, it argues that the federal government must not "tip the electoral process" by the use of its financial power. Third, it maintains that the taxpayers must not be forced, directly or indirectly, to contribute to the support of an ideological cause that they may oppose. I am in basic agreement with each of these arguments. However, to the best of my knowledge, current law effectively and reasonably guards against the use of federal dollars for these activities.

Finally, OMB argues that the federal government must not give the appearance that it is taking sides on issues of public policy by funding particular organizations. I do not find this argument very compelling. It assumes either very little intelligence or a lot of imagination in concluding that because an organization receives federal funding, it will be thought to bear the federal government's imprimatur. Indeed, OMB has consistently maintained that federal awards are made solely on the basis of merit and that they are blind to politics. I believe the public and Congress can be trusted to discern that Planned Parenthood does not speak for President Reagan.

The stated purpose of the revision, "to ensure that federal tax dollars are not used, directly or indirectly, for the support of political advocacy," is not controversial. However, the proposed revision would extend well beyond this reasonable standard to

place restrictions on the use of private dollars. This appears to me to be the sort of federal interference that we should avoid at all costs. If current restrictions are insufficient in barring federal funds from being used in political activity, then we should examine minor, technical corrections to remedy this situation. We should not, however, embrace a wholesale crippling of federal contractors and grantees' ability to communicate with the various levels of government.

This is the likely outcome of the proposed revision. The definition of prohibited "political advocacy" has been so broadened as to include wholly legitimate activity on the part of recipients of federal funds. Such activity has traditionally been conducted with the knowledge and accord of Congress. This comes as no surprise since the practical and technical expertise of federal grant recipients is essential to the informed and intelligent conduct of any Congressional office.

The proposed revision would bar not only traditionally restricted lobbying and electoral activities, but would extend to participation in all government processes -- legislative, administrative and judicial. Unsolicited communication with a Congressional office by a nonprofit organization on virtually any subject would put the organization's funding in jeopardy. Many organizations could be expected to remain silent rather than run the risk of disallowed costs or debarment.

Should this revision go forward in much the same form, it would be to everyone's detriment. The failings of government -- local, state and federal -- would continue. Yet the people often most strategically placed to witness these shortcomings would be silenced. Are food banks able to meet the demand? We would not know. Is the job training program living up to expectations? We would not know that either.

While OMB recognizes the First Amendment rights of Americans as important to this discussion, and while it acknowledges that "the activities of government in a democracy necessarily involve a degree of political advocacy," the advocacy of OMB's democracy is apparently a one-way street. OMB points to the need for government officials, elected and appointed, "to communicate with the people, explain their programs, and provide leadership and direction to the nation." But, I believe that this "leadership and direction" would materially suffer without the information and guidance currently provided by the wide range of organizations and corporations receiving federal grants and contracts.

To be fair, the proposed revision does not make political activity impossible for federal grantees; just so difficult as to make it very unlikely that any but the largest profit and nonprofit organizations would continue to engage in "political advocacy" as OMB defines it. Only these organizations would be

able to set up the two distinct offices contemplated by the revision. Smaller organizations would be unable to do so. I am disturbed by the implications of this, as it seems to distort the very process that OMB seeks to correct.

Finally, I would like to reiterate my hope that the drafters of the new proposal will take a more circumscribed approach towards this issue, neither overestimating the problem nor underestimating the American people's intelligence. I do not believe that the scope of this problem is nearly so large as the reach of the currently proposed revision. Moreover, any problems that may exist are not confined to either the profit or nonprofit sectors. I hope and trust that any new revision will treat each in an even-handed way, and that OMB will consult closely with Congress in the crafting of the new revision.

STATEMENT OF CONGRESSMAN TED WEISS

I would like to commend Chairman Brooks for holding this hearing on OMB's proposed revision to Circular A-122. This hearing affords the Congress and the public an important opportunity to examine the serious and far-reaching consequences of OMB's determination to exclude non-profit organizations from participating in all government decision-making.

Although the stated intent of OMB's proposal is to ensure that federal funds do not support political activity, the effect would be to bar non-profit federal grantees from participating in our democratic process, even if such activity is funded exclusively by private resources. The proposal defines political advocacy in terms so broad and vague that almost any communication or involvement with government or any effort to influence or inform the public would be suspect and subject to OMB scrutiny. Its most insidious application would be to impose sanctions against non-profit organizations whose staff members are "required" or "induced" (left undefined in the proposal) to engage in political advocacy on their own time.

Essentially, this radical departure from current policy would force organizations to choose between receiving federal grants and participating in government affairs, unless of

course, they are able to maintain two completely separate operations. As we all know, few non-profit organizations can afford this illogical, inefficient and unnecessary duplication of staff and facilities.

OMB's proposal constitutes frightening evidence that this Administration is ready to renounce its responsibility to nurture government that is both open and responsive to all Americans. This closed and exclusive posture jeopardizes the integrity of our democratic political process and the protections guaranteed the public by the First Amendment. By predicated the receipt of federal grants and contracts on the abdication of one's constitutionally protected rights, OMB has unilaterally overstepped Congressional limitations on political activities of tax-exempt organizations and the use of federal dollars for lobbying and partisan activities. Further, OMB has blatantly disregarded the dictates of numerous Supreme Court decisions that carefully guard against government infringement on First Amendment rights.

While OMB claims that its rule would neutralize the process of awarding federal grants, in reality, the proposal would establish double standards that are highly discriminatory. Well established, financially secure non-profit organizations might be able to restructure themselves in order to accommodate OMB's requirements and still remain involved in public affairs. However, it would be financially impossible for the vast majority of non-profits, particularly those which represent or provide services to the poor, minorities, and the politically disadvantaged, to both fulfill grant obligations and engage

in political advocacy. The Supreme Court directly addressed this question of equal protection, "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion" (Buckley v. Valeo). OMB's willingness to arbitrarily trample on the fundamental rights of those unable to afford its new mandate places in serious doubt this Administration's commitment to protecting civil rights and furthering equal access to government for all our citizens.

OMB's crusade to impede the workings of participatory democracy severely threatens our ability to develop sound and just public policy at the federal, state and local level. It is precisely the free flow of ideas, the sharing of diverse perspectives, and the communication of factual information that help mitigate the possibility of unaccountable, harmful, and ill-advised government decision-making. Non-profit organizations, many of which provide direct government services to their communities, often offer government vital information on the efficiency and effectiveness of public programs. It is simply unreasonable and impractical for the Administration, particularly given the President's emphasis on private sector initiatives, to insulate government from the insight and experience of its non-profit grantees.

It is my understanding that as a result of the tremendous public outcry, OMB has decided to revise and reissue its recommendations. May I suggest that OMB not waste its time and energy; the proposal is fundamentally wrong and unconstitutional and should be completely withdrawn. Rather than devising new ways to rob citizens of their involvement with government, OMB and the Administration should scrupulously work toward fostering open rule, not only for the people, but by the people as well.

AMERICAN COUNCIL ON EDUCATION

Division of Governmental Relations

March 7, 1983

The Honorable Jack Brooks, Chairman
 Subcommittee on Legislation and
 National Security
 Committee on Government Operations
 U.S. House of Representatives
 Washington, DC 20515

Dear Mr. Chairman:

On behalf of the American Council on Education, an association representing over 1,500 colleges and universities and other organizations in higher education, and the associations listed below, we appreciate this opportunity to comment on the Administration's proposal to disallow costs related to "political advocacy," which was the subject of hearings held by the Subcommittee on March 1st. We ask that our comments be included in the record of those hearings.

Our chief interest in this proposal is threefold. We are concerned over the inconsistent reports of the intended scope of the proposed rules; we object to the proposal on practical grounds; and we believe the proposal in its current form has no statutory basis and is constitutionally suspect.

The Scope of the Proposed Regulations

The Office of Management and Budget published these proposed regulations in the Federal Register of Monday, January 24, 1983, as a notice offering interested parties an opportunity to comment on a proposed revision to OMB Circular A-122, "Cost Principles for Nonprofit Organizations." In their present form, these principles are applicable to higher education associations but not to colleges and universities themselves, whose federal grants and contracts are governed by OMB Circular A-21, "Cost Principles for Educational Institutions." However, both the Summary and the Appendix to the notice indicate that similar revisions are being proposed simultaneously for civilian and defense contractors through appropriate actions of the Department of Defense, National Aeronautics and Space Administration, and General Services Administration. One of our associations has received a letter from the Deputy Under Secretary of Defense (Acquisition Management) requesting comments on the proposed changes to the various cost principles in the Defense Acquisition Regulations, which govern defense contracts.

Many of the nation's colleges and universities are recipients of contracts from the Department of Defense and have similar contractual relationships with major civilian departments and agencies. Therefore, even though Circular A-122 does not currently apply to educational institutions, those major colleges and universities which are civilian and defense contractors would be subject to the provisions of the proposed revision if these were to be incorporated across the board into the various procurement regulations. Whether or not this will be done is uncertain at this time.

On the one hand, both OMB's Counsel for Policy Analysis and Law, who was the principal author of the proposal, and the Director of its Financial Management Division, who is the official OMB point of contact, have advised various representatives of the academic community that the proposal will not be applied to colleges and universities. On the other hand, in response to questions regarding the Department of Defense's invitation for comment on behalf of the academic community, the Director of the Defense Acquisition Regulatory Council has stated unequivocally that the proposed rules are intended to be applied across the board to all defense contractors, specifically including colleges and universities as well as nonprofit and commercial organizations. His counterpart in GSA's Federal Procurement Regulations Directorate, which publishes the cost principles applicable to all contractors with the civilian agencies of the government, is less certain of the intended scope of this proposal, but "would not be surprised" if college and university contractors were included.

In addition, the unsigned, undated question and answer sheet now available from OMB's Office of Public Affairs, is internally inconsistent. Question 7 asks, "Are the proposals applicable across the board, to contractors as well as nonprofit grantees?" The answer given is, "Yes. OMB's proposed changes in Circular A-122 apply to nonprofit organizations, while identical proposals by Defense and GSA apply to contractors." That answer supports the DOD contention that the proposal will apply to college and university contractors. But the next sentence of the answer says, "The proposals do not apply to state and local governments or their contractors or grantees, or to hospitals, universities or Indian tribes." Given the conflicting statements of officials who administer federal grants and contracts, we believe that the exclusion of colleges and universities from the scope of any proposed new strictures should be stated by OMB clearly and explicitly.

Practical Objections

No reasonable person could object to the purported purpose of the rule proposed at 48 FR 3348, which is to ensure that federal tax dollars are not used, directly or indirectly, for the support of "political advocacy." Nor could any reasonable person object to the use of the statutory definition of "influencing legislation" contained in the Internal Revenue Code of 1954 at 26 U.S.C. 4911 as the basis for the definition to be inserted in the proposed cost principles. But the proposed rule greatly expands and distorts that statutory definition, as well as the prohibition against the use of appropriated funds to pay the expenses of "any activity designed to influence legislation or appropriations pending before Congress" contained in P.L. 95-480 and subsequent appropriation acts of the Department of Health and Human Services.

Under the proposed rule, organizations and individuals could not write to or speak with federal officials or legislators or file *amicus curiae* briefs with the courts, even on their own time and with their own money, without penalty. The rule would provide for a flat prohibition on federal reimbursement for space, salaries, telephones, photocopying, meetings, conferences,

publications, and other operating costs of federal projects, if an organization uses the same personnel or facilities to conduct "political advocacy" that it uses to carry out work under federal grants and contracts. This would subject individuals and organizations who communicated with federal officials or legislators with the loss of federal grant and contract funds, or force them to segregate completely all personnel and facilities receiving federal funds from those involved in political advocacy. The latter alternative is unworkable.

In particular, it is not possible for the executive director of an organization to divorce himself or herself from either the service or the advocacy side of the operation. He or she must be responsible for all the important pursuits of the organization. Thus, when the government comes to a voluntary organization requesting help with certain public services, or when the organization seeks to perform services, the government usually requires that a portion of the chief executive's time be assigned to the project. This is a measure of assurance that the project receives the highest level of attention. By the same token, if the organization seeks to express its views to an executive department or agency, to the Congress, before a court, or even to the public, the chief executive must naturally be involved in the formulation of the organization's position and will usually sign any letters or statements involved. It would be unrealistic and unfair to require the director to disqualify himself or herself from either aspect of an organization's work.

This proposal would therefore have a significant and deleterious impact on the participation of nonprofit organizations in the governmental decision-making process. The breadth of the proposed regulation would cause turmoil within the nonprofit sector, reducing its capacity to perform public service functions effectively. Although we are sympathetic with OMB's stated goal, it is our position that the proposed revision is excessive, unwieldy, and unnecessarily disruptive of the legitimate functions of nonprofit organizations.

Moreover, were DOD, NASA, or GSA to incorporate the proposed rule across the board into the principal procurement regulations, a university which is a federal contractor would be penalized if its president in a commencement address urged support for higher education, or in a community forum made a statement in favor of a city bringing in a new industry. In addition, a university would be unable to claim salary costs for activity directly applied to a federal research project by a professor of microbiology who made a public statement expressing concern about pollution of the environment. Apparently, even if only an infinitesimal portion of the activity of a university president or professor is devoted to making such statements, no part of his or her salary could be charged to indirect cost recovery. This penalty assessed for participating in public discussion of issues would impede the exchange of ideas and viewpoints that is vital to the public good.

In their current form, Circulars A-122 and A-21 provide a reasonable set of procedures based on uniform and sound accounting principles for determining costs under federal grants and contracts. The proposed revisions would undermine the procedures now in place and would violate the tenants of good accounting by requiring inconsistent treatment of similar costs.

Statutory and Constitutional Objections

Although the Congress has sought from time to time to limit lobbying activities by federal grantees, the higher education community is unaware of any statutory basis for such a sweeping prohibition as that contained in these proposed rules and in the above cited letter from the Deputy Under Secretary of Defense. Further, we believe that the proposal in (b)(4) to expand the Internal Revenue Code's prohibition against influencing "any legislation" to include influencing "governmental decisions," which is defined in (e)(2) as including "any rulemaking, guidelines, policy statement, or other administrative decisions of general applicability and future effect" would be directly contrary to the provisions of Sec. 3517 of the Paperwork Reduction Act of 1980 (P.L. 96-511)(44 U.S.C. 3517).

In addition, prohibition of reimbursement for costs of nonpolitical activities which are attributable to employees, equipment, or facilities also involved in privately-funded political advocacy is constitutionally suspect. Without repeating the legal arguments advanced in greater detail by other organizations, we wish to state our belief that the proposed rule denying contractors and grantees reimbursement of the costs of entirely proper, non-political activities chills the exercise of First Amendment rights of such groups to participate in the governmental process. Such a rule, if drawn at all, must under a long line of cases be narrowly structured to protect a compelling governmental interest. Surely, a minimal restriction could be devised, if it be warranted at all, that would deny reimbursement for actual lobbying activities without having the entire amount contaminated by the slightest involvement in political advocacy.

The strictures already imposed on nonprofit organizations by the Internal Revenue Code provide more than adequate safeguards against excessive lobbying activities by such organizations. There has been no evidence adduced to demonstrate that the requirements of colleges, universities, and other charitable organizations to observe such regulations have been abused. Furthermore, absent an explicit statutory basis, OMB should not be permitted to promulgate a rule such as that currently proposed.

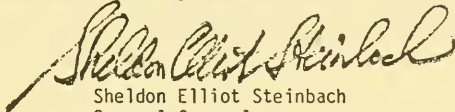
Conclusion

On February 25th OMB announced that the original proposed rule would, in effect, be withdrawn, and that a revised proposal would be issued within two weeks of that date, initiating another 45-day comment period. We intend to make our concerns known to officials in OMB and other affected agencies and departments. We greatly appreciate this opportunity to bring our views to the attention of the Subcommittee, and we stand ready to work with you to ensure that any rules promulgated will achieve the desired results with a minimum of interference in the full exercise of the rights and legitimate functions of nonprofit organizations, including our nation's colleges and universities.

This letter is sent on behalf of:

American Association of Community and Junior Colleges
 American Association of State Colleges and Universities
 American Council on Education
 Association of American Colleges
 Association of American Medical Colleges
 Association of American Universities
 Association of Urban Universities
 Council of Graduate Schools in the United States
 Council of Independent Colleges
 Council on Governmental Relations
 National Association of College and University Business Officers
 National Association of Independent Colleges and Universities
 National Association of Schools and Colleges of the United Methodist
 Church
 National Association of State Universities and Land-Grant Colleges
 National Association of Student Financial Aid Administrators

Sincerely,



Sheldon Elliot Steinbach
 General Counsel

cc: Members of the Subcommittee

SES:gfr



AMERICAN DENTAL ASSOCIATION

WASHINGTON OFFICE • SUITE 1004 / 1101-17TH STREET, N.W. • WASHINGTON, D.C. 20036 • PHONE 202/833-3036

March 4, 1983

The Honorable Jack Brooks
 Chairman
 Subcommittee on Legislation and National Security
 Committee on Government Operations
 2157 Rayburn House Office Building
 Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to express the views of the American Dental Association concerning OMB's proposed revisions to Circular A-122, Cost Principles for Nonprofit Organizations. I request that these comments be included in the hearing record of the subcommittee.

In short, the Association believes the proposed rule is unreasonably harsh and should be withdrawn. It would submit nonprofit organizations such as the ADA to unnecessary restrictions in order to achieve the goal of limiting federal funds from being used for political advocacy. As proposed, the rule would restrict severely the ability of partially federally-funded groups to participate in the political process. It also provides extreme punitive action for even technical violations.

The Association has specific objections to several basic provisions included in the draft regulations:

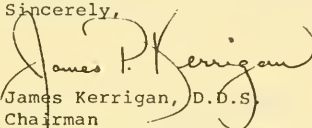
- The new definition of political advocacy is unreasonably broad. The prohibition of activities such as submitting amicus curiae briefs and commenting on regulations removes major avenues of redress from nonprofit groups.
- The new proposal departs from a system that would allow legitimate costs to be funded under a grant or contract, and substitutes the overly restrictive plan for absolute separation of activities.
- Organizations would be restricted from participating in cooperative efforts with other nonprofit groups due to the fear of being tainted by their "political advocacy."

- The rule would prevent many organizations from providing necessary information to legislators and administrators.

We believe that adequate safeguards now exist to ensure that only legitimate costs are paid for with federal funds. The new proposal is therefore unnecessary. It would only serve to prevent groups and individuals from exercising their First Amendment right of free speech and the ability to petition their government.

Thank you for allowing us this opportunity to present our views.

Sincerely,


James P. Kerrigan, D.D.S.
Chairman
Council on Legislation

JK/jes

PUBLIC COMMENT
SUBMITTED BY HELEN ARNOLD
TULSA, OKLAHOMA

Mr. Chairman and Members of the Government Operations Committee. I want to thank you for the opportunity to make comments on the proposed OMB rules and regulations regarding advocacy on issues and laws by non-profit organizations.

I am Helen Arnold, I am a former State Representative and live in Tulsa, Oklahoma. I have been involved for many years in citizen participation and with various non-profit organizations in my community and state. It is from this viewpoint that I wish to address what the Office of Budget and Management proposes to do to non-profit organization.

I am sure all of you are keenly aware of the first amendment to the Constitution of the United States but it never hurts to reiterate those wonderful words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

Today, more than any time in the history of our country, I believe there is a concerted effort to repeal, by the fiat of rules and regulations, this part of our Constitution. It

is no more evident than in the Executive Departments of the present administration.

It is my belief that the agenda of some people in this country is to silence those citizens who do not profess their particular brand of political philosophy. I am determined this will not happen and am asking you to commit yourself to do the same.

When President Reagan took office he asked that the private sector initiate a program of taking over or at least helping the government provide services which he felt our government could not longer afford, the private-public sector initiative. Now, we find that if we do this we are not supposed to comment on any law or propose any public policy changes without being punished by withdrawal of the public support.

It is my understanding that these rules not only forbid those organizations who receive federal funds to speak out on federal issues but also go so far as to forbid comment on local issues. Organizations which would be affected and therefore their members would not be able to speak out in one voice, would be Planned Parenthood, Senior Citizens, Environmental Organizations, League of Women Voters, Organizations that help the poor through commodity distribution, Educational Institutions and Public Schools.

I can envision interpreting these rules so that if you receive any indirect help such as being non-profit or gifts are tax deductible that would be considered as receiving federal monies and you could no longer advocate changes in government policy or law. Could these rules and regulations silence churches, farmers organizations, professional organizations? I don't know but lets not take any chances.

I ask you to deny these rules and regulations. Uphold the first amendment to the constitution and reaffirm the public policy of our government that it is of the people, for the people and by the people. Government is in trouble in this country, many people feel it cannot be trusted and if these Al22 Review rules and regulations are put into effect their doubts will be confirmed.

Thank you again for the opportunity to comment to the committee.



BUSINESS ADVISORY COUNCIL ON FEDERAL REPORTS

1001 Connecticut Avenue, N.W., Suite 925, Washington, D.C. 20036 • (202) 331-1915

March 4, 1983

The Honorable Jack Brooks
Chairman, Subcommittee on Legislation
and National Security
Committee on Government Operations
Room B-373
Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Brooks:

BACFR emphatically states that issuance of the proposed revision to Office of Management and Budget Circular A-122, "Cost Principles for Nonprofit Organizations" would pose a serious threat to effective implementation of the Paperwork Reduction Act of 1980. The proposed revision of OMB Circular A-122, published in the Federal Register January 24, and companion proposals of the Department of Defense, General Services Administration and National Aeronautics and Space Administration are absurd in the breadth of activities that would newly be considered as "political advocacy."

To illustrate our concern. . .

for some years, BACFR and its members knowledgeable in the complex field of federal procurement have labored to pare back unnecessary and wasteful reporting and recordkeeping mandates imposed on federal contractors. These and other efforts to eliminate or reduce unnecessary and unduly burdensome paperwork requirements are documented in the BACFR 1982 Annual Report, copy enclosed for your convenience.

The best way to accomplish these cost-cutting objectives is for company personnel charged with completion of a particular information requirement to provide commentary to initiating agencies, the Office of Management and Budget, and (in connection with their information resource management reviews) the General Accounting Office. Without informed business comments - in large measure provided through the efforts of BACFR - government officials have no concrete basis for changing or deleting unwise, unintelligible and unnecessary information collection proposals. One of the cornerstones of the 1980 Act is Section 3517 which requires the Director of OMB to "provide interested agencies and persons early and meaningful opportunity to comment." (Emphasis added.)

Proposed OMB Circular A-122 together with the companion pronouncements of the DOD, GSA and NASA, would significantly subvert the 1980 Act, as well as amplifying provisions in OMB Proposed Rule, 5 CFR Part 1320, "Controlling Paperwork Burdens on the Public." (See, for example, Sections 1320.12(e) and 1320.18; BACFR recommended amendment of both sections to make them conform more closely with Section 3517 of the 1980 Act.)

The proposed circular would disallow the full salary of a contractor's employee who furnishes comments to policy-making officials in Government - whether federal, state or local. Other costs would also be disallowed. The effect, bayonetting of much informed commentary to government, will seriously impair the exchange of views contemplated under the 1980 Act. We submit this is detrimental to the national interest and contrary to the continuously expressed views of your Committee and the Congress.

Unless proposed Circular A-122 is permanently withdrawn, gargantuan amounts of additional recordkeeping and, for sure, reporting demands will spew forth, adding immense additional paperwork costs. The crying need is to simplify and cut procurement and other red tape for all sizes and types of businesses. There is a pressing need to strengthen and expand the base of U.S. contractors. Proposed A-122 will have a contrary, negative effect especially with respect to smaller businesses. Among other things, companies would be obliged to maintain and review a "diary" of contacts and conversations participated in by their employees. We have consulted a number of members in preparing this statement. It reflects the views of large and small firms doing or seeking to do business with the federal government.

We appreciate the unbroken attention that you as Chairman, the members of your Committee and your staff devote to issues related to the Paperwork Reduction Act. We respectfully request that this statement be included in the printed record of your hearings.

Sincerely,

David M. Marsh

David M. Marsh
Executive Director

DMM:amh
Enclosure
cc: The Honorable Frank Horton



center for community change

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March 2, 1983

The Honorable Jack Brooks
Chairman
Government Operations
U.S. House of Representatives
Room 2449, Rayburn Bldg.
Washington, D.C. 20515

Dear Congressman Brooks:

Enclosed are the comments of the Center for Community Change on the proposed amendments by OMB to its Circular A-122. We hope they may be included as part of the record connected with the hearings which your sub-committee held yesterday.

These amendments are an effrontery both to the private non-profit sector at a time when it is already under siege as a result of the federal budget cutbacks and to the spirit of the first amendment rights of all American institutions and individuals.

We trust that you and your colleagues will do your best to see that the attempts of the Office of Management and Budget to impose additional restrictions on the operation of non-profit organizations are completely stopped.

With best wishes.

OFFICERS

Pablo Eisenberg
President
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Vice President
Andrew Mott
Vice President
Othello Poulard
Vice President
Leonard Lesser
Secretary/
General Counsel

Sincerely,

Pablo Eisenberg
Pablo Eisenberg
President

PE/psm
Enclosure



center for community change

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February 25, 1983

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Mr. John Lordan, Chief
Financial Management Branch
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Lordan:

I am writing to express our strongest possible objections to the proposed amendments to Circular A-122, "Cost Principles for Nonprofit Organizations", which appeared in the Federal Register on January 24, 1983.

It is not often that an agency or office of the executive branch of the federal government publicly recommends regulations or directives that are so sweepingly restrictive, so vague in definition, so injurious to the programs they are supposed to benefit, and so insensitive to the First Amendment rights of private sector institutions. The nature of the proposed amendments casts serious doubts, and indeed a deep shadow, on the motivation of those who were responsible for the draft regulations as well as on their consistency with the President's public statements with regard to private sector initiatives and de-regulation.

These proposed amendments do not offer a constructive approach to documented problems of political advocacy on the part of federal grantees and contractors. Rather, they appear to be a punitive effort to restrict the legitimate advocacy activities of private nonprofit organizations. They reflect at best a lack of understanding about how nonprofit organizations are organized and operate in the real world. They are a heavy-handed attempt by the federal government to regulate and control nonprofit organizations in a way that violates the very spirit of public/private sector partnerships which the current Administration has championed through the President's Task Force on Private Sector Initiatives and other efforts.

The proposed amendments in our view are deficient for a number of reasons which are listed below.

OFFICERS

Pablo Eisenberg
PresidentArthur Brazier
Vice PresidentAndrew Mott
Vice PresidentOthello Poulard
Vice PresidentLeonard Lesser
Secretary/
General Counsel

1. Added Restrictions Are Unnecessary

Tax-exempt nonprofit organizations are currently barred from participating in partisan political activities. Under the Internal Revenue Code, they are also prohibited from carrying on substantial lobbying, except for those public charities which elect to be subject to specific limits on lobbying expenditures. In addition, most federal agencies specifically prohibit the use of their grant funds for lobbying and political activities. In short, protections do exist which prevent federal funds from being used to support political or legislative advocacy.

What then is the problem which the amendments are designed to correct? The summary of the proposed revised circular suggests that there are serious abuses by federal grantees in the use of federal funds for "political advocacy". Yet no specifics are given. No serious case is made to prove this sweeping allegation. What kinds of inappropriate activity are occurring? Where is the documentation? Who specifically is complaining? What agencies or Congressmen are concerned?

It is reasonable to expect that any radical change in public policy would be the result of substantial failures in the system, a series of documented serious abuses and a crescendo of public complaints demanding change. No such events have occurred to justify the proposed policy shifts.

Such a lack of justification coupled with radical moves to restrict First Amendment rights understandably leads to the suspicion that the real goals of the amendments cannot be justified on their merits, and that their purposes are in fact punitive.

2. The Restrictions Limit Many Activities Which Are Essential and Neither Political Nor Legislative

While using the broad term "political advocacy" to create the sense that the directive is aimed at activities in which groups use federal funds to engage in politics or lobbying, the amendments in fact would restrict many non-political and non-legislative activities. They would restrict normal -- in fact essential -- participation by nonprofits in the regulatory and government decision-making processes.

Let me cite a few examples of activities which would be effectively barred for the private nonprofit organizations with which we work. These organizations are largely privately supported neighborhood and rural community groups representing poor and minority people. Such groups exemplify the best in American traditions of self-help and private initiative, and have been cited by President Reagan and leaders in the Administration for their value.

A low-income community group which receives Section 8 subsidies to rehabilitate housing would be unable to testify in public hearings and advocate that Community Development Block Grant funds be allocated for street improvements or relocation assistance related to that rehab project.

A minority organization receiving funds from the Office of Juvenile Justice and Delinquency Prevention under the Violent Juvenile Offender Program which was designed by this Administration would not be permitted to meet with the police department and discuss changes in policy which would lead to more effective methods for street patrols or handling juvenile offenders or getting greater cooperation from victims and witnesses to crimes.

A community group receiving assistance from ACTION under the Foster Grandparents program -- which Mrs. Reagan has strongly backed -- could not meet with local school officials to advocate any changes in after-hours programs or the use of school facilities.

A Head Start program could not participate in state hearings on the use of Education Block Grant funds. A community health center could not participate in any discussion of state usage of Maternal and Child Health or Preventive Health Block Grant funds.

These are essential activities. They are essential in terms of First Amendment rights, the health and independence of the private sector from the heavy hand of government, and the job to be done to improve opportunities and living conditions for low income Americans.

A broad attack on these essential rights and activities, couched in vague and ambiguous language, and subject to arbitrary interpretation or selective enforcement, presents a great danger to the nation.

3. The Restrictions Would Increase Costs for Nonprofits, Private Philanthropy, and the Federal Government

Nonprofit organizations are already suffering from severe financial problems. The state of the economy, the cutbacks in federal domestic support for the nonprofit sector, and the inability of private philanthropy to fill the gap have greatly reduced the funds available to nonprofits.

These new restrictions would increase costs for nonprofits which refused to choose between accepting federal funds and exercising their rights to carry out essential and Constitutionally-guaranteed rights. Such groups would have to establish a second parallel structure, with a separate staff, separate equipment, and a separate office. Large profit-making entities might be able to afford this duplication and increased costs, but nonprofits -- especially small nonprofits -- could not.

Philanthropy would be burdened with these costs as well. If their grantees were hit by the inflationary impact of these new regulations -- an ironic result considering the emphasis of the Vice President's task force on deregulation -- philanthropists in corporations and foundations would have to increase their giving or see the impact of their funding undercut.

Finally, government itself would feel this inflationary impact. It, too, would be faced with having to cover higher costs or see services reduced.

4. The Directive Violates the Spirit of Public/Private Partnerships

The Administration has often stressed partnerships with the private sector. Such partnerships necessarily include the mixing of public and private money to achieve mutual goals.

Yet the directive would gravely restrict the rights of the private sector. It would create an imbalance, undercutting the independence of the private sector while strengthening the hand of the federal government. This one of the several ironies in the proposed amendments.

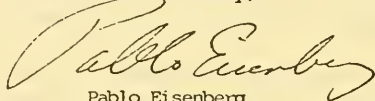
5. These Radical, Restrictive Changes in Policy Would Be Instituted by Fiat, Without Legislative Authorization

The Administration has often criticized federal agencies which have issued regulations which go far beyond the intent of Congress and, in effect, make law without involvement of the legislative branch.

These proposed amendments are the epitome of such abuses. They impose burdensome, restrictive, and costly new regulations. They would have enormous consequences for the functioning of the nonprofit sector. They raise fundamental Constitutional questions. And they were issued without Congressional hearings, public debate, or legislation.

It is absolutely essential that the proposed amendments be withdrawn immediately and in their entirety. It is completely inappropriate for OMB to issue such regulations or, indeed, to initiate any new regulations which involve major substantive policy changes without appropriate Congressional involvement.

Yours sincerely,

A handwritten signature in cursive script, reading "Pablo Eisenberg". The signature is fluid and elegant, with a large initial "P" and a long, sweeping underline.

Pablo Eisenberg
President



The College Board

888 Seventh Avenue, New York, New York 10106
(212) 582-6210

Office of the President

March 4, 1983

Mr. John J. Lordan
Chief, Financial Management Branch
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Lordan:

In accordance with your January 24, 1983 Federal Register notice of proposed revision to Circular A-122 "Cost Principles for Nonprofit Organizations," I appreciate the opportunity to comment on this important matter.

The College Board as a national nonprofit educational association with a membership of 2,500 colleges, universities, schools and educational associations would be affected by the proposed circular and is deeply concerned about the appropriateness promulgating such a rule. We oppose the adoption of the proposed revision and respectfully recommend that the Office of Management and Budget withdraw its proposal for several reasons.

Circular A-122 would expand the definition of "political advocacy" for nonprofit organizations such as the College Board far beyond the scope of definitions currently in effect. The proposed definition would be so pervasive that it would dramatically restrict the extent to which nonprofit organizations receiving Federal monies could participate in the public policy-making process. In operation, proposed A-122 would have the effect not only of restricting the use of government funds for political advocacy purposes but also would restrict the use of non-federal funds.

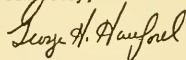
The proposed revision, especially regarding the definition of political advocacy, appears to be excessive in several respects. First, the revision is proposed without documentation of substantial abuse in use of public funds for political advocacy by nonprofit organizations. Additionally, current law and the Internal Revenue Code contain restrictions on lobbying and political activity which adequately protect the public's interest.

Finally, the Office of Management and Budget may lack the statutory authority required to impose the proposed restrictions and such restrictions may be in violation of First Amendment constitutional rights.

A-122 as proposed would significantly hinder a nonprofit organization's ability to deliver service and thereby would not work in the public's interest.

We urge you to consider withdrawal of Circular A-122.

Sincerely,

A handwritten signature in dark ink, appearing to read "George H. Hanford". The signature is written in a cursive style with a large initial "G".

George H. Hanford
President

GHH:lt

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS (CODSIA)

1612 K Street, N.W., Suite 1100
WASHINGTON, D.C. 20006

(202) 331-8050

March 4, 1983

Mr. John J. Lordan
Chief, Financial Management Branch
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Lordan:

The undersigned member associations of the Council of Defense and Space Industry Associations (CODSIA) take this opportunity to comment on the OMB Release (OMB 84-4) dated January 20, dealing with "political advocacy," and the documents which implement the stated changes; i.e., the revisions of Circular A-122, dealing with non-profit organizations and the proposed changes in contracting regulations announced by the major contracting agencies.

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The Department of Defense encouraged the formation of this organization as a vehicle for obtaining broad industry reactions to new or revised regulations and similar matters. CODSIA is composed of six associations, the National Security Industrial Association, the Aerospace Industries Association, the Motor Vehicle Manufacturers Association, the Shipbuilders Council of America, the Electronic Industries Association, and the American Electronics Association. They represent approximately 3,000 large and small member firms across the nation.

On March 1, 1983, in hearings before the Subcommittee on Legislation and National Security of the House Government Operations Committee, the OMB, represented by Mr. Joseph Wright, acknowledged substantive deficiencies in the proposed revisions as originally presented and the need for revision. In this regard, senior members of the Subcommittee strongly urged that any further action in this matter be after judicious study of the alleged problem followed by appropriate public hearings and participation by all affected parties.

It is our considered opinion that the proposed changes in the long term will adversely impact the national security, and further are unjustified by evidence or need and produce an unreasonable, and punitive result. We submit that the proposal should be withdrawn because:

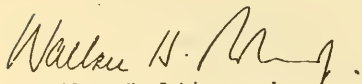
- o The definition of political advocacy is vague and broad, overreaches existing law, and places an unreasonable burden on contractors.
- o The broad and vague definition of political advocacy would imply that most marketing activities are included in the category of disallowed costs.
- o The definition of political advocacy improperly includes communication with any legislative body or government official, including the state and local levels. Thus, a local plant manager's effort to solve a tax problem with the city council would automatically result in his annual salary being disallowed as a cost of doing business.
- o Contacts with Rule-Making and Policy-Making officials are not political advocacy and the definition of political advocacy would erroneously restrict or preclude communications needed by the government.
- o It impedes essential communications required between government and industry, and punishes those who do business with the government.
- o It establishes a "contamination" (all or none) test of political involvement that is impractical, discriminatory and unfair. By attempting to create a physical wall of separation between the activities of political advocacy and the activities of performing a contract it would unjustly enrich the government by denying reimbursement for any of the work of an employee, 99% of whose time had been productively spent in support of a contract and 1% in political advocacy.
- o A contractor is penalized by being required to physically separate the personnel, building and equipment used in contract work from those employed in any degree for political advocacy.

- o The far-reaching concepts of cost disallowance are punitive in nature and unjustifiably restrict the exercise of constitutionally guaranteed rights. The concepts will inhibit advocacy by business and trade groups to the advantage of those interests, many foreign and domestic, which oppose them in the political arena.
- o It conflicts with the 1962 Revenue Act which allows most lobbying and other political advocacy on matters of direct interest to a taxpayer to be deductible business expenses. The Revenue Act recognizes the necessity for business to communicate with legislators.
- o It imposes limitations on uses of appropriated funds beyond those imposed by the DoD and other Appropriations Acts.
- o The many fundamental differences between "for-profit" and "non-profit" organizations preclude the fair and reasonable application to both of the same cost principles.
- o It will have a devastating effect on smaller businesses, since they are especially vulnerable to absorbing costs of doing business with the government.
- o These concepts are directly in conflict with major policy statements contained in the Federal Procurement Policy Declaration of the Office of Federal Procurement Policy Act Amendments of 1979 (P.L. 96-83), established to promote economy, efficiency and effectiveness in procurement of property and services. They are also directly in conflict with President Reagan's Executive Order 12352 of March 17, 1982, entitled "Federal Procurement Reforms." Finally, the Reagan administration's goal of deregulation and the associated need for additional communication is being abandoned by this proposal of "overregulation."

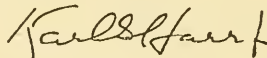
If adopted, these changes would materially affect the national security interests of the United States, and would increase costs of defense programs by reducing the free flow of information necessary to the interests of the United States, reducing competition, discouraging participation in the defense mobilization base, and limiting capital available for investment in productivity enhancement.

The attached statement sets forth detailed comments on the proposal as initially presented. Although we have additional areas of objection that could be discussed, we respectfully urge that on the basis of our statement the proposal be withdrawn and that no further action on revisions to A-122 or the cost principles be taken by OMB, DoD, GSA, or NASA.

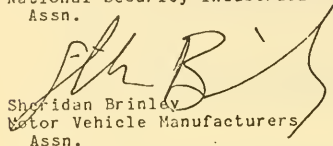
Sincerely;



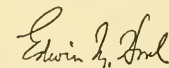
Wallace H. Robinson, Jr.
President
National Security Industrial
Assn.



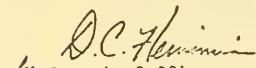
Karl G. Harr, Jr.
President
Aerospace Industries Association



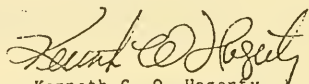
Sheridan Brinley
Motor Vehicle Manufacturers
Assn.



Edwin M. Hood
President
Shipbuilders Council of America



Jean A. Caffiaux
Vice President
Electronic Industries Assn.



Kenneth C. O. Hagerty
American Electronics Assn.

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS (CODSIA)

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Statement on
proposed Revision to OMB Circular A-122
and the proposed changes in Contracting Regulations

This statement provides the response of the designated Associations of the Council of Defense and Space Industry Associations (CODSIA) to the proposed revisions to Circular A-122 and cost principles affecting all government contractors.

CODSIA is composed of six associations, the National Security Industrial Association, the Aerospace Industries Association, the Motor Vehicle Manufacturers Association, the Shipbuilders Council of America, the Electronic Industries Association, and the American Electronics Association. They represent approximately 3,000 large and small member firms across the nation, all having common interests in defense and space fields. CODSIA was formed in 1964 as a vehicle for providing to government broad industry reaction to new or revised regulations.

The definition of political advocacy is based upon an erroneous premise. A-122 and a letter on this subject recently received from the office of the Deputy Under Secretary of Defense state, "The definition of political advocacy is derived generally from the Internal Revenue Code, 26 USC 4911." Under that Section of the Code an excise tax is imposed on certain public charities which make excess expenditures for lobbying activities during the tax year. This section was promulgated exclusively for application to public charitable organizations. To use this section as a basis for the definition of "political advocacy" applicable to government contractors, business leagues, or trade associations is beyond comprehension. Trade associations are governed by Section 501(c)(6) and have their own definition of lobbying under the IRC. Government contractors cannot logically be subjected to regulations on political advocacy intended for the conduct of public charities. Applying this faulty logic, the concepts of political advocacy under the OMB proposal produce impracticable, vague, and punitive conclusions. In addition, the several court decisions cited as the basis for the proposed circular bear no relevance to the activities of for-profit government contractors.

Executive Summary

The member associations of CODSIA submit that the proposal should be withdrawn in its entirety because:

- o The definition of political advocacy is vague and broad, overreaches existing law, and places an unreasonable burden on contractors.
- o The broad and vague definition of political advocacy would imply that most marketing activities are included in the category of disallowed costs.

- o The definition of political advocacy improperly includes communication with any legislative body or government official, including the state and local levels. Thus, a local plant manager's effort to solve a tax problem with the city council would automatically result in his annual salary being disallowed as a cost of doing business.
- o Contacts with Rule-Making and Policy-Making officials are not political advocacy and the definition of political advocacy would erroneously restrict or preclude communications needed by the government.
- o It impedes essential communications required between government and industry, and punishes those who do business with the government.
- o It establishes a "contamination" (all or none) test of political involvement that is impractical, discriminatory and unfair. By attempting to create a physical wall of separation between the activities of political advocacy and the activities of performing a contract it would unjustly enrich the government by denying reimbursement for any of the work of an employee, 99% of whose time had been productively spent in support of a contract and 1% in political advocacy.
- o A contractor is penalized by being required to physically separate the personnel, building and equipment used in contract work from those employed in any degree for political advocacy.
- o The far-reaching concepts of cost disallowance are punitive in nature and unjustifiably restrict the exercise of constitutionally guaranteed rights. These concepts will inhibit advocacy by business and trade groups to the advantage of those interests, many foreign and domestic, which oppose them in the political arena.
- o It conflicts with the 1962 Revenue Act which allows most lobbying and other political advocacy on matters of direct interest to a taxpayer to be deductible business expenses. The Revenue Act recognizes the necessity for business to communicate with legislators.
- o It imposes limitations on uses of appropriated funds beyond those imposed by the DoD and other Appropriations Acts.
- o The many fundamental differences between "for-profit" and "non-profit" organizations preclude the

fair and reasonable application to both of the same cost principles.

- o It will have a devastating effect on smaller businesses, since they are especially vulnerable to absorbing costs of doing business with the government.
- o These concepts are directly in conflict with major policy statements contained in the Federal Procurement Policy Declaration of the Office of Federal Procurement Policy Act Amendments of 1979 (P.L. 96-83), established to promote economy, efficiency and effectiveness in procurement of property and services. They are also directly in conflict with President Reagan's Executive Order 12352 of March 17, 1982, entitled "Federal Procurement Reforms." Finally, the Reagan administration's goal of deregulation and the associated need for additional communication is being abandoned by this proposal of "overregulation."

The cost of any activity undertaken must be included in the price charged by the business for its goods and services. If the cost is not recovered in pricing contracts to which it must be allocated, profit degradation will result. The activity will necessarily be impaired and the uses for profit such as investment in improved productivity, plant modernization, and competitive parity curtailed.

Cost principles should recognize as allowable all normal and necessary costs of doing business. This was recognized by the Executive Office of the President, the Office of Management and Budget and the Office of Federal Procurement Policy less than a year ago in the Proposal for a Uniform Federal Procurement System at Page 25:

"Present cost principles will be reviewed with the objective of allowing all normal and necessary costs of doing business. The cost principles will recognize that the disallowance of necessary costs erodes contractor profits. This in turn reduces competition. The only unallowable costs should be those which are against public policy."

Thus, the underlying issues are whether the activities being labeled "political advocacy" are contrary to public policy, and, if so, how those costs are to be defined and identified.

1. COSTS NECESSARY TO THE USUAL CONDUCT OF BUSINESS SHOULD NOT BE CONSIDERED CONTRARY TO PUBLIC POLICY.

The proposed definition of "political advocacy" is extremely vague and broad and encompasses many activities not previously considered "lobbying". This new definition overreaches both the letter and intent of existing law and places an unreasonable and punitive burden on com-

panies doing business with the government.

1.1 Most Elements of "Political Advocacy" are Normal Costs of Doing Business and Should be Allowable if they are Tax Deductible.

Communications between Government and industry are essential to the proper conduct of business both by Government and by industry. Even where these communications are intended to influence opinions, they often convey needed information.

In the report of the Investigations Subcommittee of the House Committee on Armed Services dated December 30, 1982, Congressman Samuel S. Stratton stated forcefully the need to protect Government/Industry exchange of information and opinion:

Without information provided by the Air Force and the Department of Defense, as well as the contractors involved, Congress would be unable to make an informed choice.

To impair this flow of technical information, by either the Department of Defense or the contractors, . . . will damage the national interest and conflict with the admonitions of the Founding Fathers.

DoD has stated that discussions by Federal agencies and their contractors on such important matters of mutual interest occur routinely throughout the government and are necessary for the very functioning of government.

No regulation should interfere with the exchange of necessary information between the Government and those who would do business with the Government. The proposed regulation grossly interferes with this exchange and creates a disincentive and penalty for doing business with the Government.

The subject of what costs of the Government/Business information exchange should be recognized as necessary business costs has been the subject of considerable debate for many years. Congress and the IRS have answered this question in the Revenue Act of 1962 and the implementing Treasury regulations.

In that Act, Congress recognized that in order for a business to function efficiently in today's economy, it must be able to monitor legislative developments carefully, include them in its plans for doing business, and communicate its views on such legislation to Congress and state governments. That Revenue Act created a specific deduction for political advocacy in Section 162(e) of the Internal Revenue Code and eliminated the confusion caused by then-existing regulations which sought to distinguish between regular business expenses and legislative efforts.

The proposed modifications would reverse the progress made in the 1962 Revenue Act by requiring government contractors to attempt the con-

fusing and burdensome task of determining what corporate resources can be devoted to any form of government relations without risking disallowance of the entire cost of those resources under Federal contracts. This is precisely what Congress sought to avoid in the 1962 Revenue Act. Congress said:

"It is also desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to Members of Congress or legislators at other levels of Government." (Emphasis added.) 1962 U.S. Code Cong. & Ad. News at 3325. House Report No. 1447, 87th Congress, 2nd Session, pg. 17, Senate Committee on Finance, Senate Report No. 1881, 87th Congress, 2nd Session, pg. 22.

The Treasury Department regulations provide that legislation is deemed to be of direct interest to a taxpayer if the legislation is of such a nature that it will, or may reasonably be expected to, affect the trade or business of the taxpayer. If legislation has such a relationship to a trade or business that the expenses of any appearance or communication in connection with it meet the ordinary and necessary test, then such legislation usually meets the "direct interest" test.

The following are pertinent examples of legislation recognized in Treasury Department regulations which meet the direct interest test so as to be deductible as a business expense:

- (a) Legislation which would increase or decrease the taxes applicable to the trade or business.
- (b) Legislation which would increase or decrease the operating costs or earnings of the trade or business.
- (c) Legislation which would increase or decrease the administrative burdens connected with the trade or business.
- (d) Legislation which would favorably or adversely affect business of a competitor so as to affect the taxpayer's competitive position.

Congress also established in the 1962 Revenue Act reasonable limitations on the deductibility of lobbying expenses, such as:

"(2) Limitation.--The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift or otherwise)--

"(A) for participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

"(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums." IRC sec.162(e)(2)

There is indeed a difference between activities to inform Congress on legislative matters of direct interest to a contractor's well-being and the grass roots activities and political campaigning referred to in Internal Revenue Code, Section 162(e)(2). If the Administration desires to disallow the latter costs and still not choke off appropriate communications with the Congress, it would be well advised to follow the IRS regulations which were adopted under the Revenue Act of 1962.

1.2 Regulations Defining "Political Advocacy" Should Not Impose Limitations Beyond Those Directed by Congress.

Congress has stated in the FY'83 DoD Appropriations Act that:

"None of the funds made available by this Act shall be used in any way directly, or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress." (PL-97-377 Sect. 796).

Congress has thus prohibited the Defense Department from spending appropriated funds to hire anyone to lobby the Congress or to organize the general public in grassroots lobbying. It has imposed no other restriction on the use of appropriated funds.

These congressional restrictions are the broadest which should be imposed upon cost allowability by OMB or DoD. The symmetry between the Internal Revenue Code limits on business deductions and the limits imposed on Defense Department expenditures is no coincidence. However, most of the broad categories of costs to be disallowed under the proposed changes cannot be found within the restrictions imposed by Congress. The revisions would include in "lobbying" many forms of government-industry interactions which have never before been included in any statute or regulation governing lobbying.

The best example is the Federal Regulation of Lobbying Act, 2 U.S.C. sec. 261 et. seq. (1946). That statute requires lobbyists to register, identify their constituents, and report quarterly on their activities and expenditures. Lobbyists are defined to be persons paid to influence the federal legislative process. 2 U.S.C. sec. 267. No one seeking to influence any action of the executive branch is covered, regardless of whether the relevant executive branch action is rule making, formulation of policy or licensing. No person or business is recognized to be "lobbying" by virtue of membership in a trade association. The law thus defines lobbying in accord with its commonly accepted meaning, that is, direct communication with members of Congress on pending or proposed federal legislation. U.S. v. Harris, 347 U.S. 612 (1954).

While Congress has barred the Department of Defense from funding lobbying of the U.S. Congress either directly or indirectly, it has not barred payment for contact with the executive branch, state or local officials, or trade association memberships. Had Congress intended to do so, it would have enacted far broader restrictions on the use of appropriated funds. It having declined to do so, Congressional policy should not be overreached by the proposed regulations. In summary, Congress has already spoken on these limitations of allowability and dealt appropriately and effectively with any problem which may result from "political advocacy".

2. THE "ON/OFF" TEST OF POLITICAL INVOLVEMENT IS UNREASONABLE IN TODAY'S CLOSELY-REGULATED BUSINESS WORLD

The stated intent of the drafters of the proposed changes is to create physical and organizational "walls of separation" between the activities considered to be political advocacy and the activities required for performing a contract. The constantly evolving nature of Federal, state and local law precludes this simplistic "binary" or "on/off" approach to before-the-fact separation of activities. The extent and nature of activities considered to be political advocacy can not be identified in advance of need nor can the individuals whose participation may be required. No contractor can anticipate the frequent changes in the many environmental, contractual, or tax regulations affecting his business.

The argument that "physical separation" could preclude audit surveillance and after-the-fact questioning is completely mistaken. The opportunities for audit and investigation throughout the many activities of contractors impacted by these proposals will be multiplied. Every aspect of contract performance and contractor activity will be open to investigation for some taint of "political advocacy" which could disallow the entire annual cost of the people, equipment and facilities involved in the performance of the government contracts.

The proposal states that the salary costs of individuals are unallowable if the work of such individuals includes any amount of political advocacy. Other cost principles set aside only the applicable portion of the cost of activities deemed unallowable. This proposal is all-encompassing, so that any activity declared unallowable renders the whole activity unallowable and the entire salary cost of the individual is unallowable for the year.

An example of the effect of this proposal would be the denial of any reimbursement to a contractor for the work of an employee, 99% of whose time had been productively spent in support of a contract and 1% in political advocacy. The government would be unjustly enriched by the value of his work applied to the government contract, while the contractor is penalized for having participated in business related political activities.

The penalty that a contractor incurs when he fails to physically separate the personnel, building, and equipment used in grant or contract work from those employed in whole or in part for political

advocacy is unconscionable. The government's interest in not subsidizing political advocacy cannot possibly justify the penalty of disallowance of clearly allocable, reasonable, and otherwise allowable costs of doing business incurred under a contract or grant and unrelated to the political advocacy activities.

Consider the result, under the proposed rules, of a corporation using its expensive computer resources to do work under a government contract as well as corporate work such as keeping payroll records and issuing checks. If the company has a Political Action Committee (PAC), and uses a payroll deduction plan to fund it automatically, the entire capital and non-capital costs of the computer would be disallowed, even though its "political" use takes only the smallest fraction of its productive time.

Neither the 5% rule nor any other arbitrary percentage rule has any justifiable basis and must simply be penal in nature. It disregards the fundamental rules of government cost principles developed over many years. Many contractors have a separate corporate office, several division/company offices, and a Washington office. The corporate and company offices are established to manage the entire operation of the corporation or individual facility; i.e., Industrial Relations, Engineering, Manufacturing, Quality Assurance, Scientists, Procurement, Finance, Accounting, Legal, Contracts and Pricing, Marketing, Public Affairs, etc. The Chief Executive Officer (CEO), the President, the Executive Vice President, and the Division General Managers/Company Presidents are required to be involved in every aspect of the company's business, including political advocacy. If they are not, they violate their fiduciary duty to their shareholders. To suggest that high-level executives can abstain from political advocacy as defined in the proposal or assign their duty to others, is to admit one does not understand the duties and obligations of a business executive. It is simply punitive to go further and state that if a CEO or any other employee makes one air trip on a corporate aircraft for political advocacy, the annual cost of the plane and his salary is unallowable.

Under current procedure which is simple, understood, and effective, if unallowable costs are incurred, the Corporation/Company or division, or Washington office facility can then segregate unallowable expenses and continue to allocate properly allowable costs. Existing law and regulation (cost accounting standards) adequately protect the Government's interest. There is no justification for application of a "contamination" test to any one individual or any category of costs.

Under the "contamination" principle, disallowing the annual salary of an employee whose time may be devoted exclusively to the direct performance of a contract because he was induced to contribute to an advocacy association, such as a PAC, is an attempt to regulate employer-employee relationships through cost disallowance which has no relationship whatsoever to whether any government funds are involved in political advocacy. If an employee is subjected to an inappropriate inducement with respect to contributions or other infringements on his activities away from the job, he already has adequate remedies under the law.

3. POLITICAL ADVOCACY SHOULD EXCLUDE MARKETING, ALL LEGISLATIVE LIAISON, INTERACTION WITH STATE AND LOCAL GOVERNMENTS, AND RULE-MAKING AND POLICY MAKING.

The total function of marketing should be specifically excluded from the definitions of political advocacy. Marketing is an attempt to sell a product or service to a customer, which includes applying or making a proposal or bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such proposal or bid, or providing a regular dialogue and exchange of data and information for the purposes of developing solutions to future requirements, and identifying new requirements that can be satisfied by existing product lines. Clearly, marketing bears no relationship to political advocacy.

In addition, actions or decisions related to the administration of the specific grant, contract or agreement involved, actions necessary for the delivery of the product to the government, and actions benefiting the safety and general welfare of the community involved with the specific grant, contract or agreement could fall within the broad and vague definition of political advocacy.

The vague definition of political advocacy could be interpreted to include legislative liaison. Normal legislative liaison activities such as the gathering of information on pending legislation, status and interpretations of legislation, analysis of the effect of pending legislation, and attendance at hearings should not result in unallowable costs. The government contract cost principles should be consistent with existing legislation on this subject. It is noted that Senator Pryor, who has in the past proposed that lobbying costs be prohibited, excluded legislative liaison activities from his definition of lobbying.

"While lobbying may be conceived as somewhat broad, certain activities are excluded from the definition, such as the following: communications made in response to a request from a Member of Congress; passive attendance at legislative proceedings, that is, attendance without engaging is (sic) prohibited lobbying activities; nonpaid communications made through public information channels; and inquiries made regarding the existence or status of legislation. We believe that all necessary business expenses recognized under the tax code should be allowed except those precluded by the Appropriations Act." (Congressional Record, Nov. 30, 1981, S 14112).

In the proposal "political advocacy" includes activity that attempts to influence governmental decisions through communication with any member of a legislative body or with any governmental official or employee who may participate in the decision-making process, and includes activity at the state and local levels of government. There are innumerable activities conducted by companies of our member associations at the

federal, state and local level which have as their desired result the more efficient and less costly operation of the plant or offices in that jurisdiction. Those activities are normal, reasonable actions which a prudent businessman must take in the conduct of his business and in fact are required in the performance of contracts with the government.

In every state, contractor representatives communicate with and testify before state legislative committees, municipal councils, zoning boards, school boards, port commissions, tax boards and environmental control boards seeking a wide range of rulings, authorizations, statutes, interpretations and other decisions which are directly concerned with the operation of the contractors' businesses throughout the states. All of these activities would be subject to classification as political advocacy.

The incidence of these activities and the identity of the persons and facilities involved cannot be predicted nor can they be limited to a "separated" activity.

The total effect of such activities is to improve the overall efficiency of the plant or office and minimize its overall cost of operation, the benefit of which is passed on to the government and other customers in accordance with the cost allocation system for those activities. For the government to require and promote on the one hand efficiencies and cost control and on the other hand to deny the allowability of costs to achieve them is incongruous and self-defeating.

Finally, suppliers to the Federal Government necessarily must interface with agencies of the Executive Branch of government. Many agencies of the Executive Branch are not subject to the Administrative Procedures Act and are not required to give notice and a period of time to comment on any proposed rule or policy. With this in mind, for the proposal to make unallowable costs of participating in any rule-making or policy-making activity that is not requested is totally unreasonable. Without a direct connection to the influencing of elections or political fund raising activities, none of such activities with the Executive Branch relating to matters of direct interest should be considered political advocacy.

4. SMALLER BUSINESSES WILL BE PENALIZED MOST HARSHLY

We believe that the proposed regulations would have a particularly devastating effect on small businesses substantially involved in government procurement. For many businesses, the salary of individuals engaged in "political advocacy" could exceed the profits of the entire organization. It is not enough to say that they may "choose" not to participate in advocacy as some "advocacy" is necessary to the conduct of any business. They may simply be precluded from doing business with the Government.

5. THE SEPARATION OF PRIVATE AND PUBLIC FUNDS

We regard as invalid the premise that federal funds are used by con-

tractors for political advocacy. Money spent by federal contractors has never been treated as a federal expenditure. The separation of public and private funds is an essential element of government procurement law which is premised on use of the private sector as the most economical, efficient and effective means for obtaining goods and services. The importance of preserving this separation was noted recently by the Department of Defense in denying General Accounting office allegations that DoD payments to contractors were illegal because of limitations in an appropriations Act on the use of appropriated funds for certain kinds of political activity. The DoD stated that payments were made for goods and services and not for activities, even though the payments were calculated by reference to costs incurred by the contractors. Federal funds paid to a contractor do not retain their identity when spent by a contractor.

6. PARTICIPATION IN TRADE ASSOCIATIONS SHOULD NOT RESULT IN DISALLOWED COSTS

The Executive agencies would be denied the use of hundreds of technical experts who now work problems as members of working committees of the various trade associations because their activities may be "contaminated" under the vague definition of political advocacy. It is apparent that this proposal actually disregards the value received by the Executive agencies under the present allowability principles.

7. THE PROPOSAL CONFLICTS WITH OFFICE OF FEDERAL PROCUREMENT POLICY ACT AMENDMENTS OF 1979, PRESIDENT REAGAN'S EXECUTIVE ORDER 12352, AND THE ADMINISTRATION'S GOAL OF DEREGULATION.

When the proposed concepts are applied to Federal procurement, they would directly impair seven out of the twelve Policy Statements contained in the "Declaration of Policy" enacted into law under the Office of Federal Procurement Policy Act Amendments of 1979, P.L. 96-83. They would impede the basic policy of Congress to promote economy, efficiency and effectiveness in the procurement of property and services, as follows:

1. They would decrease rather than promote full competition in procurement.
2. They would impair rather than improve the quality, efficiency, economy, and performance of Government procurement organizations and personnel.
3. They would add rather than eliminate inconsistencies in procurement laws, regulations, directives and other laws, etc., relating to procurement.
4. They would add enormous complexity rather than greater simplicity throughout procurement.
5. They would impede rather than promote economy, efficiency, and effectiveness throughout Government procurement organizations and operations.
6. They would greatly increase instead of minimizing disruptive effects of Government procurement on particular industries, areas, or occupations.
7. And finally, they would destroy rather than promote

fair dealing and equitable relationships among the parties in Government contracting.

The proposed concepts would also impair rather than promote the "Federal Procurement Reforms" required by President Reagan's Executive Order 12352 of March 17, 1982. Specifically, they would conflict with the portion of Section 1(a), which directs the establishment of programs to reduce administrative costs and other burdens imposed through the procurement function on the Federal Government and the private sector. In addition, it would directly conflict with the provisions of Section 1(a), which direct that private sector views on needed changes to regulations, paperwork, solicitation provisions, contract clauses, certifications, and other administrative procedures should be solicited. The concepts are also directly in conflict with President Reagan's direction in Section 1(d) to establish a number of criteria which would enhance effective competition. Among these criteria are providing greater latitude for private sector response in the process of establishing and describing Government needs.

The Reagan administration's goal of deregulation is commendable. However, this proposal will stifle, or at least restrict, the additional communication that is required under any deregulation program. This proposal is "overregulation" at its worst and is contrary to the administration's policy of reducing administrative burdens and regulatory control.

8. THE PROPOSAL MAY PRESENT AN UNCONSTITUTIONAL PRECLUSION OF POLITICAL ACTIVITY, AND IS THEREFORE ITSELF CONTRARY TO PUBLIC POLICY.

The proposal, notwithstanding the Summary Statements and Questions and Answers accompanying the OMB release, gives rise to several constitutional issues. True, the proposal purports to not prohibit political advocacy; however, its far-reaching and punitive concepts of cost disallowance have that very effect. For example, the proposed revisions will inhibit political advocacy by businesses and trade groups to the advantage of many interests, both foreign and domestic, which oppose them in the political arena. The rights of businesses under both the First and Fifth Amendments are thus placed in jeopardy.

Companies which do not do business with the government, as well as many public interest groups and all labor unions, suffer no inhibition to their ability to recover the costs of political advocacy from their customers, members or clients. Foreign governments or others who attempt to influence U.S. legislation and policy will suffer no such inhibition. Government contractors, on the other hand, will, in effect, pay a substantial "penalty" on their political advocacy by being unable to apportion any part of otherwise allowable costs to government contracts. This "penalty" on political advocacy is a restriction on a businessman's First Amendment right to be heard publicly.

Worse still, the regulations effectively preclude businesses from engaging in certain political activities. Despite the stated intent not to preclude business from lobbying, the denial of cost recovery

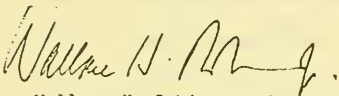
will frequently have that effect. It is submitted that the new regulations will impose an unconstitutional burden upon businesses' ability to associate and to petition their Federal, state and local governments.

CONCLUSION

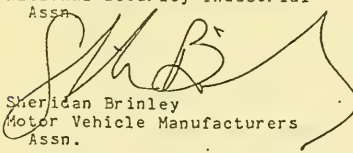
We do not believe there is any justification or demonstrated need for applying the cost principles applicable to non-profit and tax exempt organizations to "for profit" firms. The regulations currently are not identical and specifically recognize the fundamental differences in the organizations and the nature of their activities. Existing law and regulation show congressional recognition of the need for advocacy activities by providing tax deductibility for their costs and imposing specific limitations on them. They are not against public policy and thus should be recognized as allowable costs of doing business with the government.

The proposed revisions to Circular A-122 and the government contract cost principles materially and adversely affect the national security interests of the United States, are unreasonable, inherently inequitable, practically impossible to administer, and provide for penalties only applicable to criminal activities. They deprive contractors of any compensation for the cost of personnel and equipment in situations where virtually all of the cost is incurred for the Government's benefit. The proposal overreaches congressional action and restricts constitutionally guaranteed rights. Therefore, it should be withdrawn.


Sincerely,

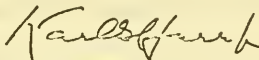


Wallace H. Robinson, Jr.
President
National Security Industrial
Assn.



Sheridan Brinley
Motor Vehicle Manufacturers
Assn.

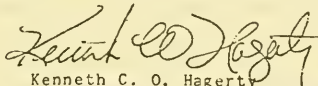
for 
Jean A. Caffiaux
Vice President
Electronic Industries Assn.



Karl G. Harr, Jr.
President
Aerospace Industries Association



Edwin M. Hood
President
Shipbuilders Council of America



Kenneth C. O. Hagerty
American Electronics Assn.

TESTIMONY BY JOHN HOUSTON, EXECUTIVE DIRECTOR, THE FAIRNESS COMMITTEE

My name is John Charles Houston. I am an attorney, and the Executive Director of the Fairness Committee Against Tax Funded Politics.

The Fairness Committee is designed to serve as a focal point for the problems created by the abuse of federal dollars, whether done under color of law or not, to engage in political advocacy.

By way of reference, the National Urban Institute estimates that over 100,000 non-profit corporations receive federal grants and contracts each year which total over \$40 billion dollars. A fair rule of thumb is that one third of those costs go to pay overhead, which would be around \$14.3 billion dollars. Approximately half of the overhead costs would be used for payroll or about \$7.15 billion a year. The other half of that \$14 billion goes to pay for copying machines, rent, computers, cars, gasoline, etc.

While there have been a number of prohibitions passed into law, forbidding the use of federal funds for lobbying by bureaucrats with federal funds, they do not address themselves to the florid political environment that has grown up in the abuse of federal funds. The abuse goes well beyond anything imagined by the Congress when it passed the current law in Sec. 1913, and includes using the job trainees to campaign for Presidential, Congressional, and local candidates, armed with computer printouts and assigned neighborhoods to work, orchestrated with the finesse of the best political machines. Other abuses include using federal funds to organize public employees into unions, funding grass roots training centers like the Midwest Academy, founded by the radical Saul Alinsky, and the Laurel Springs Institute, founded by Tom Hayden and Jane Fonda.

Another example of pervasive abuse for political purposes occurs at this moment in Los Angeles, where one of the nation's largest so-called

'poverty agencies' is presently \$36 million dollars short in unaccounted funds, and has been active in a wide variety of political endeavors, paid for by the federal tax payers. Yet, even as we speak, they may be asking for more federal grants and contracts, because there is no amount of waste, fraud, abuse, or political activism which under current law makes one ineligible to ask for more money to waste. To understand this issue, we have to draw back from the horror of individual cases, and focus on the structure of federal grants and contracts, which not only acknowledge this abuse, but in many ways encourage it.

There are various ways to characterize the ostensible and real purposes for which Federal funds are requested. Most generally, the purpose is described breezily as for services to some supposedly disadvantaged sector of the population, whether the target is the homeless, women, those with cold homes, or the poor in general. However, members of Congress need to understand that there is an historical difference between charities, which provide services to specific individuals, and political parties or factions, which lobby the recipients of these services.

What we are talking about today is most often a hybrid of the traditional ward heeler and block captain of the political precincts, using the language of charities. It is our Committee's position that if tax-exempt organizations wish to provide services which are subsidized by the Federal taxpayer, then they should desist from engaging in political activity ostensibly in behalf of those they claim to serve.

It took almost 100 years of the spoils system in the country before a Civil Service System erected a barrier between those making funding decisions and rank and file bureaucrats. Civil Service has become a hallowed legal protection against political exploitation by the politicians against underlings.

It took almost another sixty years for the Hatch Act to be passed to

protect welfare recipients, and career bureaucrats from political exploitation for campaign purposes above and beyond the Civil Service laws. The unsightliness of welfare recipients being corralled on election day by sitting members of Congress and their campaigners was rejected in favor of the principle that personal political benefit should not flow from one's ability to confer benefits on the public. To do otherwise, is to sanction wholesale blackmail of the poor, the disadvantaged, the helpless, civil servants, and the voters.

The vast increase in Federal expenditures in the last twenty years gives rise to a situation analogous to both of these abuses of the past. In conferring forty billion dollars a year on tax-exempt organizations, comes enormous political influence which has and is now being wielded on behalf of very specific and highly motivated para-political organizations. Recipients of taxpayer largesse are being corralled just as the welfare recipients were in the 1930's. They are being used for political duties not only on election day, but as a standing army for whatever demonstrations, lobbying, or letter writing that may be required.

These abuses are well-documented in the press, and have become notorious. Because many members of Congress have benefitted from these activities, there has been no rush to regulate the political behavior of these organizations. But the time is long past when any fair-minded person can ignore the corrosive effects of maintaining the status quo.

The Federal funding of political activists occurs through specific programs tailored for a particular constituency. The fact that policy and political advocates are receiving funding is not incidental, it is the primary purpose of the legislation. Payments are made for pre-determined political activity. In fact, any services provided to target populations are incidental to the overtly political nature of these activities which the

fund recipients are pursuing. No one but Congress can be responsible for such a result, and the public is increasingly aware of the nature of these programs. In fact, the public seems to be ahead of the Congress on this issue.

One program which is tailored to subsidize a particular brand of politics is the Women's Education Equity Act Program (WEEA). WEEA is a perfect example of one of these programs. On the subject of WEEA, I would like to make several points.

WEEA grants a total of about \$6 million dollars a year, not large by federal standards. But too large for anyone who believes that the Federal Government has no business reaching into the market place of ideas and subsidizing the political activity of any faction in the ideological spectrum. A great deal of this money is going to fund the political activities of its own advisory board members and their organizations. The WEEA advisory council recently rejected a perfunctory conflict of interest resolution because it would interfere with present funding of some of its board members.

A mere glance at the funding practices of WEEA demonstrates beyond any question that the real purpose of this program is to subsidize radical feminists. The paltry amount of "services and books" actually procured could have been bought for a small fraction of the cost spent by WEEA. What we have here is a jobs program for radical feminists who are feeding at the Federal trough. Leaf raking for ideologues, as it were.

I would encourage this committee to devote further time to this and other federal programs which were designed and created to subsidize propaganda for use on the American public. The public finds this practice repugnant, and would violently object to it if they understood it to be a standard practice in such programs.

Having once established a comprehensive need for reform in this area,

I want to make some comments on the OMB Regulations A-122. These regs have moved the political dialogue to an important new stage of discussing how to curb these abuses, not whether or not they are important enough to take up the time of the Congress or the White House. And once we understand that these abuses are pervasive, the need for comprehensive reform becomes necessary. For too long, each agency has had its own standards of political morality, ranging from none at all, to the whims of the present inhabitants. These regulations will require uniform standards which do not presently exist.

Secondly, the regs establish a cost principle which few will argue with in principle, who are not presently feeding at the federal trough. That is, the allocated cost of personnel, and overhead which are involved in political behavior in the full blown scene which I have described will not be paid for by the taxpayer. Just like interest and advertising costs, grantees and contractors will no longer be able to bill the feds for their political behavior. My view is that political parties ought not be able to use public money in this fashion because of their inherent political biases, and the direct subsidy that results from being able to do so. By comparison, parochial schools for a long time have been forbidden to accept public subsidy for fear of creating government subsidy to their beliefs. If that doctrine holds Constitutional water in that case, I can see no reason why the Democratic or Republican party, or any other party or faction ought to be able to receive federal funds. Such money is clearly tainted just as money to a parochial school would be.

Thirdly, the regulations do not do enough to discourage bureaucrats who are tempted to bend and break the rules from subsidizing or buying political support for their pet programs through grants and contracts. Such conflicts of interest are rife, and are not addressed by these regulations. I think your constituents would be appalled to learn that millions of dollars

a year are given by bureaucrats with explicit instructions to the grantees to lobby other public officials, including the bureaucrats themselves.

S. 3122 and H. R. 7299, introduced by Sen. Jepsen and Congressman Jeffries respectively, in the last Congress provided criminal penalties for both parties in such a transaction, and for persistent and willful abuse of federal funds for proscribed political behavior. The bill also requires a self certification process which if violated, is the basis of disbarment.

Fourth, the opponents of these regs have failed in their attempt to characterize them as an interference in their organizations' First Amendment rights. In fact, the opposite is true. These regs will prevent the First Amendment rights of the public from being impeded. It is the public that is paying for the political activity at issue here. And frequently, it is political activity which the public is not supportive of. And even if the public were supportive of some of it, the First Amendment is a two way street. It forbids the majority from imposing its beliefs on the minority through public subsidies to religion or political factions. That abuses have been accepted as routine in Washington, is merely a testimony to how out of tune Washington is with the rest of the Country.

The regulations proposed by OMB are merely a starting point for cleaning out a political mess that has persisted for a number of years. But as the Supreme Court has observed, no mistake or indiscretion can become hallowed by time if it violates the basic precepts of the Constitution. These abuses, much like their predecessors before the Civil Service System and the Hatch Act, are the tiresome but necessary duty of all those who believe that government cannot be either impartial or representative, until it is freed from the petty and fractious corruption which is self-evident to even the most determined ostrich.

FEDERATION OF PROTESTANT WELFARE AGENCIES, INC.

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Testimony of the

FEDERATION OF PROTESTANT WELFARE AGENCIES

with respect to the

Office of Management and Budget's

Proposed Revision of Circular A-122

March 4, 1983

The Federation of Protestant Welfare Agencies, the only federation of Protestant and nonsectarian human services agencies in the nation, is a planning, consulting and coordinating body of approximately 250 member agencies in the New York City metropolitan area. The Federation and its member agencies annually serve more than one million needy people of all ages, races and faiths.

The Federation welcomes the opportunity to testify on the Office of Management and Budget's proposed revisions to Circular A-122 which would establish harsh new rules to govern the advocacy efforts of nonprofit recipients of Federal funds. We strongly oppose the proposed revisions. We do so not because we believe that public money should be used for advocacy. Rather, our opposition results from our belief that existing statutes and regulations provide sufficient safeguards to insure that Federal funds are used solely for the purposes mandated by Congress. OMB's proposals will not provide a single new safeguard or a single more effective enforcement procedure to effectuate this purpose. They will succeed only in making it extremely difficult and prohibitively expensive for nonprofit recipients of Federal funds to participate in the political process under any circumstances.

Before discussing our specific objections, the Federation would like to note that our advocacy efforts will not be

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directly affected by the proposed revisions. Our budget includes no Federal funds. We present testimony because of our strong conviction that nonprofit organizations which do accept Federal funds make an invaluable contribution to the formulation of constructive and informed public policy. We know this to be true for government programs in the human services area.

Because the Federation is aware of the expertise of those engaged in providing direct services to the poor, the young and the elderly, we have encouraged our member agencies to participate in the political process. And, while we encourage participation, we also provide detailed information on the legal responsibilities of nonprofits who elect to engage in advocacy. We do not view such participation as adversarial or detrimental to the public good, a view which appears to be inherent in OMB's understanding of advocacy, but as a crucial ingredient in the formulation of sound public policy.

The revisions to Circular A-122 are objectionable on a substantial number of counts. Rather than touch on all these points, the Federation would like to focus on three specific issues. These are:

- a. that the definition of "political advocacy" in the proposed revisions is so broad and so vague that it bars those with the most expertise in specific policy areas from contributing to sound public decisions in such areas;
- b. that the proposed revisions would make it extremely expensive and difficult for nonprofits to engage in any advocacy, despite the fact that only nonfederal funds are used for this purpose, and;
- c. that the legality and constitutionality of the proposed revisions are questionable.

A. DEFINITION OF POLITICAL ADVOCACY

The OMB claims that its definition of "political advocacy" is based primarily on the definition used by the Internal Revenue Service to regulate advocacy in the nonprofit sector with certain minor "modifications". This explanation is totally misleading. The modifications provided by OMB would include in the term political advocacy a vast number of activities heretofore unaddressed by the Federal Government.

Particularly troublesome is defining "political advocacy" to include initiating communication with elected officials and their staffs and with government officers and employees who participate in the decision making process. If adopted, this definition would preclude those with the most expertise in a particular area from using their knowledge to contribute to the formulation of public policy. Therefore, the Federation believes that OMB's proposals would be self-defeating for the Federal Government, and thus, of course, for the public as well.

Federation member agencies engaged in providing day care, for example, could not communicate with Federal, State and local government officials

about perceived problems in day care programs. Equally, our agencies which provide meals to the elderly would be stopped from suggesting more efficient ways to provide food. Our examples, of course, could continue ad infinitum. The important point is that OMB is proposing a system which would mute those willing and able to make important contributions to providing quality services to those in need.

The prohibition on communication found in the OMB's definition of "political advocacy" becomes far more disturbing when understood in conjunction with its definition of "governmental decision". The latter term applies to the formulation of rules and regulations, the development of program guidelines, the fixing of fees and rates and ultimately to "any administrative decision of general applicability". Incorporating such activities into a definition of "political advocacy" is not simply modifying IRS definitions; it is fundamentally altering the meaning of the term.

In the vast majority of instances, formulating rules and regulations and establishing program guidelines are highly technical procedures and require information which is known only to experts in a particular field. Again, who knows more about the provision of day care services than those engaged in providing such service? If implemented, the OMB regulation would require the Department of Health and Human Services to contact day care providers across the country each time it required information for a new rule or regulation or lose the value of their expertise altogether. Allowing service providers to initiate communication is a far more sensible alternative. In the end those who will suffer will be those in need and ultimately the general public who will bear the burden of policy implemented in a vacuum.

B. USE OF FUNDS FOR ADVOCACY

Whether intentionally or unintentionally, the OMB's proposals would erect insurmountable roadblocks for nonprofits accepting Federal funds to engage in advocacy, although only funding from other sources is used for this purpose. Established procedures provide nonprofits accepting Federal grants and contracts with feasible methods of segregating Federal and nonfederal monies. If the OMB proposals go into effect, such procedures will have no applicability. For example, nonprofit organizations are currently permitted to distinguish the portion of an employee's salary paid for from Federal sources from the portion funded from other sources. As such, a nonprofit organization can use an employee to implement a government funded program and to perform whatever other necessary assignments are required by the organization. Under the OMB's proposals, however, a nonprofit employee whose salary was paid in part with Federal money would be barred from engaging in advocacy. The OMB revisions would similarly preclude the use of office equipment for advocacy purposes if it had been paid for in part with Federal funds. In addition, OMB would prohibit a nonprofit accepting Federal funds from using more than 5% of its office space for advocacy purposes.

Imposing restrictions of this severity on the nonprofit sector will have a devastating impact on the ability of nonprofit organizations to participate in the political process. The vast majority of nonprofit organizations providing services to those in need operate on extremely limited budgets.

Attempting to engage in advocacy in the manner required by OMB would impose an additional, crushing financial burden. At a practical level, a nonprofit recipient of Federal funds would need to hire a separate staff and rent or purchase separate office space and equipment to engage in advocacy. This, of course, is impossible. The OMB is actually requiring nonprofits to choose between providing services or taking positions on public policy questions directly affecting the services they provide. Attempting to force such a choice is highly unwise and unnecessary.

C. LEGALITY AND CONSTITUTIONALITY OF PROPOSED REVISIONS

We believe that the OMB's proposed revisions to Circular A-122 raise significant legal and constitutional questions which this Committee should examine in greater detail.

We strongly doubt that OMB has the statutory authority to regulate "political advocacy". The Office is empowered to audit government expenditures. Its authority to regulate advocacy has never been established. The regulation of advocacy in the nonprofit sector has traditionally been accomplished by the direct action of Congress and by the IRS. If Congress would like to involve the OMB in this effort, it should provide the Office with legislative authorization. The Reagan Administration has soundly condemned administrative determinations which exceed statutory mandates. Yet, we believe the OMB proposals attempt precisely this. Apparently the principle espoused by the Administration applies only to selected administrative decisions.

The Federation is also deeply concerned as to whether the Office of Management and Budget has given due consideration to the basic First Amendment rights to freedom of speech for those employed in the nonprofit sector. The restrictions on communications with elected and appointed officials embodied in the proposal strike no discernible balance between the need to insure the proper use of Federal money and the need to protect the constitutional rights of those in the nonprofit sector. For this reason alone, the Federation asks this Committee to do all in its power to stop the OMB proposal from going into effect.

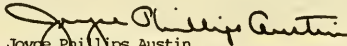
Conclusion

The Federal Government has an obligation to both insure the proper use of Federal funds and to foster an environment in which rational debate on public policy can flourish. Over many years it has developed a variety of policies to effectuate both purposes. The OMB's proposals would contribute nothing of value in either area. In fact, they would succeed only in selectively silencing those who have much to offer elected and appointed officials at all levels of government. What is most distressing about the OMB's proposals is that the Office is undoubtedly aware of the consequences of its proposals and has proceeded despite that fact. It seems to view the nonprofit sector as adversaries. This is regrettable and misinformed. It is also an

open invitation to the formulation of government programs which will be wasteful, inefficient and incapable of fulfilling their intended purposes.

Thank you for the opportunity to testify.

Submitted by,

A handwritten signature in dark ink, appearing to read "Joyce Phillips Austin". The signature is fluid and cursive, with the first name "Joyce" being the most prominent.

Joyce Phillips Austin
Executive Vice President

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Comments of INDEPENDENT SECTOR

on

Proposed Revisions to OMB Circular A-122

Summary

INDEPENDENT SECTOR is a coalition of nearly 500 national voluntary organizations, foundations, and business corporations with significant contributions programs, united by a shared commitment to strengthen our national tradition of giving, volunteering, and not-for-profit initiative.

INDEPENDENT SECTOR strongly opposes the proposed revisions to OMB Circular A-122. These rules proceed from the premise that federal grant funds should carry with them burdensome restrictions -- for many organizations the equivalent of an outright prohibition -- on grantees' First Amendment rights to lobby with privately contributed funds. Three independent and individually sufficient considerations require that this premise be rejected and the proposed rules withdrawn:

1. The Proposed Rules Are Unconstitutional. The government cannot condition the receipt of a government benefit on the surrender of a First Amendment right, except when the condition is narrowly tailored to protect a compelling state interest. The proposed requirement that grantees surrender their First Amendment rights to engage in privately-funded political advocacy imposes far broader restrictions on First Amendment rights than can be justified by any compelling state interest. Accordingly, this restriction must be struck down as an "unconstitutional condition" on the receipt of federal grant funds.

2. OMB has No Authority To Issue The Proposed Rules. The proposed rules are also legally invalid because they are (a) outside the scope of the rulemaking authority delegated to OMB by Congress, and (b) inconsistent with clearly stated Congressional intent.

3. The Proposed Rules Would Undermine The Ability Of Charities And Government To Meet Human Needs. To be effective partners with government in responding to human needs, voluntary organizations must be free both to provide services and to offer advice on how those services might be improved. Under the proposed rules they could do one or the other -- but not both, except at a prohibitively high cost and with greatly reduced effectiveness. The substantial cost of this ill-conceived proposal would ultimately be borne by those persons whom both grantees and the government agree are in need and urgently need to be served.

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Description of INDEPENDENT SECTOR

INDEPENDENT SECTOR is a membership organization comprised of 466 national voluntary organizations, foundations, and business corporations with significant contributions programs. (A membership list is attached.) These groups have joined together in INDEPENDENT SECTOR to strengthen our national tradition of giving, volunteering, and not-for-profit initiative. The organizations are as different as the American Heart Association, the United Negro College Fund, The Rockefeller Foundation, the National Council of Churches, the Shell Oil Companies Foundation, the American Association of Museums, The General Mills Foundation, the National Council of La Raza, Planned Parenthood, and Catholic Charities. The common denominator of this diverse mix is their shared determination that people will have greater opportunity to influence their own lives and the kind of society in which they live.

Analysis of Proposed Revisions to OMB Circular A-122

Congress has generally prohibited nonprofit organizations receiving federal grants or contracts from using any federal funds for lobbying or partisan political activities. These restrictions do not, however, apply to grantees' privately-funded advocacy activities, even if conducted by the same personnel, and using the same facilities, involved in the grant activity.

The cost accounting rules generally applicable to nonprofit grantees and contractors, as stated in OMB Circular A-122, currently contain no specific provisions implementing the restrictions on

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grantees' political activities. Instead, under the general principles of Circular A-122, grantees which engage in such political activities, or in any other prohibited activities, are simply denied reimbursement for the costs of those activities.

On January 24, 1983, OMB proposed, as an addition to Circular A-122, a special rule restricting the "political advocacy" activities of nonprofit grantees and contractors. Contemporaneously, the Department of Defense, GSA, and NASA proposed the addition of comparable rules to their contract and procurement regulations.

Two aspects of the proposed rules have attracted intense criticism from nonprofit organizations, the business community, Members of Congress, and the General Accounting Office. First, contrary to the general principles of Circular A-122 applied to enforce all other restrictions on federal grant funds, the proposed rules would deny reimbursement for entirely proper grant activities simply because a grantee engages in privately-funded "political advocacy."¹ Second, the rules would establish an extremely broad definition of proscribed "political advocacy" activities.

In response to the intense public criticism, OMB announced on February 25th that it will soon release for public comment a substantially revised version of the proposed rules. Since the

1. More specifically, the proposed rules would deny reimbursement for proper grant-related costs of employees and facilities if the same employees or facilities were also involved in privately-funded advocacy activities.

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principal effect of these revisions, according to OMB officials, will be to narrow the range of proscribed "political advocacy" activities, INDEPENDENT SECTOR will not comment on this aspect of the OMB proposal until it has had an opportunity to examine the revised rules.

Accordingly, these comments focus on the other major feature of the proposed rules, namely, the provisions that would deny grantees reimbursement for proper grant expenses because they engage in privately-funded advocacy activities. INDEPENDENT SECTOR is unalterably opposed to such a rule -- that would penalize grantees for engaging in privately-funded advocacy activities -- however broadly or narrowly that rule might be applied. The basis for INDEPENDENT SECTOR'S position may be summarized under the following three heads.

1. THE PROPOSED RULE IS UNCONSTITUTIONAL

The Supreme Court has repeatedly and consistently held that "even though a person has no 'right' to a valuable governmental benefit, and even though the Government may deny him that benefit for any number of reasons," it may not deny him the benefit "on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972). Accord, Thomas v. Review Board, 450 U.S. 707, 716-18 (1981); McDonald v. Paty, 435 U.S. 618, 626 (1978); Elrod v. Burns, 427 U.S. 347, 355-59 (1976) (plurality opinion).

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This "unconstitutional conditions" doctrine applies with full force here. The proposed rules would condition grantees' right to reimbursement for entirely proper grant-related expenses on their surrender of the right to engage in privately-funded advocacy activities -- activities which are clearly protected by the First Amendment. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 533 (1980).

Under established constitutional principles, such a state-imposed restriction on freedom of speech is constitutionally permissible only if it satisfies a two-part test: first, it must be justified by a compelling state interest, Consolidated Edison Co., 447 U.S. at 540; and second, it must be "closely drawn to avoid unnecessary abridgment" of First Amendment rights. First National Bank v. Bellotti, 435 U.S. 765, 786 (1978). Accord, Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 565 (1980); Shelton v. Tucker, 364 U.S. 479, 488 (1960). The proposed rules can pass neither part of this test.

No Compelling State Interest. Neither Congress nor the courts have ever suggested, nor does OMB assert, that the State has a compelling interest in restricting the use of grantees' private funds for advocacy activities. The governmental interest cited by OMB, rather, is the far narrower one of preventing the use of federal funds for advocacy activities. However, assuming for purposes of argument that this is a legitimate State interest, OMB has utterly

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failed to show that existing rules are inadequate to protect this interest, and thus that the government has a compelling interest in imposing additional restrictions on grantees' advocacy activities.

One would expect that rules imposing so great a burden on First Amendment rights would be proposed only after thorough and comprehensive analysis had demonstrated a serious compliance problem under existing rules. However, OMB has presented no comprehensive evidence showing widespread diversion of federal grants funds for prohibited advocacy activities. Instead, in response to repeated inquiries, OMB has identified only a small number of cases involving arguable violations of the existing restrictions. Its written testimony submitted to the Subcommittee on Legislation and National Security of the House Government Affairs Committee identifies only three such cases.

According to OMB, the definitive support for its view that this small number of alleged violations is "the tip of the iceberg," is provided by studies conducted by the General Accounting Office. Yet, in his testimony to the Legislation and National Security Subcommittee, the Comptroller General disagreed. In response to a direct question as to the seriousness of the problem, the Comptroller General stated flatly, "the problem is not large."

The Restrictions Are Not Narrowly Drawn. Further, OMB has failed to explain why broad restrictions on grantees' privately--funded advocacy activities -- rather than clarification or more vigorous enforcement of the existing, far less burdensome

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restrictions on federally-funded advocacy -- are needed to respond to the limited violations it has identified. Each of OMB's proposed justifications is untenable. First, OMB suggests that because of lack of clarity in the existing rules, many of the activities which it regards as violations are arguably permissible. Surely, the proper initial response to this problem is to clarify the current rules -- not to reject them summarily in favor of far broader restrictions.

Second, OMB asserts that its proposed rules are needed because enforcement of the current rules is "exceedingly difficult." However, the Comptroller General, on whom OMB relies to support this assertion, has flatly disagreed. In his congressional testimony, the Comptroller General not only rejected the need for the broad OMB has proposed, but also suggested that the OMB proposal, itself, would create serious enforcement problems.

Third, OMB argues that the existing rules provide no effective sanctions because "the recovery by the government of a small allocable share of costs wrongfully billed to the government provides no deterrent to misconduct, and in many cases is so small as not to justify enforcement at all." This argument turns logic on its head; the very fact that the amount of funds diverted to advocacy is generally so small is hardly a reason why the penalty must be disproportionately large.

The overbreadth of OMB's proposed restrictions on privately-funded advocacy activities is further demonstrated by OMB's

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continued willingness to rely on far narrower restrictions to prevent all other misappropriations of federal grant funds. This disparate treatment clearly demands an explanation of why it is more difficult under current rules for government auditors to cope with diversions of grant funds for advocacy than for all other prohibited purposes. OMB offers none. Absent such an explanation, one can only conclude that OMB considers the public interest more gravely threatened by diversion of grant funds for political advocacy -- an activity protected by the First Amendment -- than by outright theft, fraud, or other misuse of public funds.

* * *

In sum, the proposed rules simply cannot be justified as narrowly drawn to protect a compelling state interest. Accordingly, they violate grantees' First Amendment rights to engage in advocacy activities.

2. OMB HAS NO AUTHORITY TO ISSUE THE PROPOSED RULES

OMB cites no legal authority for issuance of the proposed rules. Careful legal analysis indicates that it has none. OMB's rulemaking authority, like that of other administrative agencies, is limited to that delegated by Congress. As stated in a recent, unanimous decision of the Supreme Court,

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The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress.

Chrysler Corporation v. Brown, 441 U.S. 281, 302 (1978). The proposed rules are rooted in no such Congressional delegation of authority. Congress has not delegated to OMB any specific authority to regulate advocacy activities of nonprofit organizations receiving federal grants and contracts. Nor can authority for the proposed rules be found in Congress' general delegation of authority to OMB to issue rules to promote "efficiency" and "consistency" in the administration of federal grants and contracts. See, e.g. 41 U.S.C. §508.

Rules issued pursuant to such a general delegation of authority are valid only if clearly and directly related to the purpose for which Congress delegated that authority. Liberty Mutual Insurance Company v. Friedman, 639 F. 2d 164, 169 (4th Cir. 1981). To uphold such rules, a court must "reasonably be able to conclude that the grant of authority contemplated the regulations issued." Chrysler Corporation v. Brown, 441 U.S. 281, 308 (1978). In making this determination, the courts have placed particular importance on whether the agency has held hearings, conducted studies, or otherwise developed a cogent administrative record demonstrating the relationship between the proposed rules and the purposes Congress sought to achieve in delegating the rulemaking authority on which the agency relies. Liberty Mutual, supra, at 170-71. Moreover,

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where First Amendment freedoms and other fundamental constitutional liberties are involved, the courts "construe narrowly all delegated powers that curtail or dilute [such freedoms]." Kent v. Dulles, 357 U.S. 116, 129 (1958).

When tested against these established legal standards, the proposed rules fall clearly outside OMB's general rulemaking authority. As noted above, OMB has not presented a detailed and comprehensive set of findings to document the need for the proposed rules. Instead, the studies cited by OMB provide only fragmentary and inconclusive evidence as to whether there is any compliance problem under existing rules, and no evidence or analysis to suggest that the proposed broad restrictions on grantees' rights to engage in privately-funded advocacy are rationally related to the efficient administration of federal grants. On the contrary, it is clear that the required duplication of staffs and facilities would increase, rather than decrease, the cost of federal grant activities. The obvious absence of any nexus between the proposed restrictions and OMB's proper regulatory objectives was underscored by the Comptroller General in his testimony to the Legislation and National Security Subcommittee:

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Under the OMB proposal it is clear that there is no reasonable relationship between the proscribed activities and the requirement for forfeiture where the Government is not being charged in any way for those activities. We don't understand why engaging in political advocacy on one's own time is any different from engaging in any other nonreimbursable activity on one's own time. [Emphasis added.]

This lack of rational relationship between the proposed rules and the Congressional purpose underlying the grant of rulemaking authority to OMB would invalidate the rules even if First Amendment rights were not involved. Because such rights are involved, thus requiring the courts to construe more narrowly OMB's delegated authority, the inadequacy of that authority to support the proposed rules is yet more certain.

Moreover, the proposed rules are also invalid because they are inconsistent with clearly stated congressional intent. When Congress has explicitly addressed the question, it has made clear that in imposing restrictions on the use of federal funds for advocacy activities, it did not intend to restrict the privately-funded advocacy activities of grantees.² Similarly, while imposing restrictions

2. For example, in discussing the 1967 amendments to the Economic Opportunity Act of 1964, which initially imposed the restrictions now contained in section 656 of the Head Start Act, 42 U.S.C. 9851, the conference report states that,

Where a State or political subdivision, or a public or private non-profit agency, carries on programs assisted in whole or in part, under

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on legislative lobbying, Congress has generally not restricted grantees' rights to contact executive agencies. On both points, therefore, the proposed rules are inconsistent with clear manifestations of Congressional intent. The Supreme Court has consistently held that rules which are so clearly "out of harmony with [Congressional intent]," are "a mere nullity." Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936); Dixon v. U.S., 381 U.S. 68, 74 (1965); U.S. v. Larinoff, 431 U.S. 864, 873 (note 12) (1977).

3. THE PROPOSED RULES WOULD UNDERMINE THE ABILITY OF CHARITIES AND GOVERNMENT TO MEET HUMAN NEEDS

This Administration has repeatedly stressed its commitment to the importance of public-private partnerships in meeting human needs. We share that commitment, and the fundamental premise on which it rests, namely, that the private sector -- particularly private voluntary organizations, with their deep roots in the community and their long traditions of community service -- often have a clearer

(cont.)

this Act, the limitation of [this section] does not apply to any other activities they may carry on with funds not provided under the authority of the act. Similarly, officials and personnel of such agencies are subject to the limitations of this section only as to that portion of their time for which they receive compensation provided directly or indirectly under the authority of the Act.

H. Conf. Rpt. No. 1012, 1967 U.S. Code Cong. & Ad. News, at P. 2598, 90th Cong., 1st Sess. (Emphasis added.)

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understanding than does government of community problems and how best to address them.

However, public-private partnerships cannot work -- indeed, the very concept becomes incoherent -- if government seeks to build a wall preventing communication between the public and private partners providers. A vital partnership must be an equal partnership. The private "partners" must be free -- as they would not be under the proposed rules -- to offer advice as well as to shoulder the day-to-day responsibilities of providing services.

OMB claims to accept this premise, and asserts that its proposed rules would not preclude such an equal partnership. It suggests that private organizations could continue both grant-funded activities and privately-funded advocacy activities, and would "merely" be required to conduct these activities with separate staffs and facilities. However, this suggestion of a total physical separation of grant and advocacy activities is so patently unworkable as to seem disingenuous.

Separation Would Often be Impossible. Small local organizations, often with a paid staff of only one or two, comprise a large and important part of the voluntary sector. For virtually all of these small organizations, creating separate staffs, much less separate facilities, for advocacy and all other program activities would be an absolute impossibility. These organizations would thus face the stark choice of abandoning one or the other of these activities.

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Separation is equally impossible for key personnel of larger organizations. For example, an executive director would have no choice but to stay on one side or the other of the wall OMB seeks to erect between advocacy and other program activities. Whichever side were chosen, an executive director so constrained could hardly provide effective overall leadership for his or her organization.

Separation Would be Wasteful. The duplication of staff and facilities suggested by OMB would also be manifestly wasteful. Both government and private resources that would otherwise be available to meet basic human needs would be needlessly spent hiring two staffs, paying for two copying machines, renting two offices, and duplicating every other resource required for the organization's activities. At a time when we are painfully aware of the limited resources available to meet social needs, such waste would be unconscionable. That a proposal entailing such waste should come from OMB is simply incredible.

Separation Would Mean Ill-Informed Government Decisions. An administration which recognizes as a fundamental weakness of the federal government its remoteness from the social problems it seeks to address should be concerned with providing government decision-makers with more information -- not less -- from the service providers in the front-line trenches. Yet under the proposed rules, the only employees of a nonprofit grantee who could discuss the grant program with government officials, or share their views on the program with the public, would be those employees who have absolutely no

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involvement with the grant activities. Nor could these non-grant employees first solicit the views of their grant-supported colleagues without violating the strict separation that the proposed rules would require. Thus, both government officials and the public would be denied the advice of those persons with the most intimate knowledge of a grant program's strengths and weaknesses. The inevitable results would be ill-informed decisions, ineffective programs, and, most importantly, needlessly unmet human needs.

Conclusion

The proposed rules are unconstitutional and outside OMB's rulemaking authority. Far from strengthening the political process, they would seriously undermine it. Instead of promoting public-private partnerships, they would frustrate both public and private efforts to meet urgent human needs.

In his testimony to the Subcommittee on Legislation and National Security, the Comptroller General stated that,

We think that any regulations go too far ... when they require a Federal contractor or grantee to forfeit reimbursement for legitimately incurred expenses merely because the contractor or grantee has engaged in perfectly proper political advocacy with non-Federal funds.

INDEPENDENT SECTOR agrees, and strongly urges that the proposed amendments to Circular A-122 be withdrawn.

Statement of Charles V. Bergstrom
Lutheran Council in the USA
To the House Committee on Government Operations
Subcommittee on Legislation and National Security
on the Issue of Proposed Amendments to the
Office of Management and Budget Circular A-122

March 4, 1983

My name is Charles V. Bergstrom. I serve as Executive Director of the Office for Governmental Affairs, the Lutheran Council in the U.S.A. On behalf of the Council, I express appreciation to the Chairman and to members of the Subcommittee for conducting the hearing on March 1, 1983, and for providing the opportunity for the Lutheran Council and its constituent bodies represented by our office. I am speaking on behalf of three church bodies of the Lutheran Council:

The American Lutheran Church, headquartered in Minneapolis, Minnesota, composed of 4,900 congregations having approximately 2.4 million U.S. members;

The Lutheran Church in America, headquartered in New York, New York, composed of 5,800 congregations having approximately 2.9 million members in the U.S.; and

The Association of Evangelical Lutheran Churches, headquartered in St. Louis, Missouri, composed of 270 congregations having approximately 110,000 U.S. members.

We share in the opposition expressed by members of your committee, other members of Congress, and the long list of witnesses who appeared on March 1. My statement will be very brief, since the Lutheran Council in the USA is a member of the Independent Sector. The president of the Independent Sector, Mr. Brian O'Connell, appeared as a witness at the March 1 hearing of your Subcommittee; in his written report he specifically has labeled the OMB Circular A-122 amendments as "unnecessary, unworkable, and unconstitutional." We concur.

In 1979, the Lutheran Council convened a consultation on church and government, and in May of that year adopted a statement concerning the churches' ministry of advocacy. A copy of that statement is attached. It presents a very clear theological basis for church-government interaction and for advocacy. I ask that you note particularly the emphasis on the need for such interaction for the common good of all, for the alleviation of poverty, and the continued strengthening of social justice. I quote the following from that 1979 statement as directly related to our oppositions to OMB Circular A-122:

"That the Lutheran Council urge the participating churches to object when governmental regulation of church-related educational institutions and social service agencies violates due process, exceeds statutory authority or infringes on First Amendment guarantees;

"That the Lutheran Council encourage the participating churches to join, when possible, with other members of the voluntary sector in objecting to unreasonable regulations;

"That in order to maximize the access of citizens in our pluralistic society to education and social services from agencies and institutions of their choice the Lutheran Council encourage the further exploration and assessment of all constitutional means of government support for a variety of social and educational services at all levels, whether public, private, or church-related."

We oppose the OMB amendments to Circular A-122 and we will oppose any revised editions. There is no need for it and it is a mockery in the face of the administration's call upon the voluntary sector for help in serving people. Surely it is clear that no great misuse of government funds has occurred. The nonprofit voluntary sector's record is one of dedication.

We believe that the religious community is in a unique position to provide assistance--both privately and governmentally funded--to those in the society who are in the greatest need, both at home and abroad. We are committed, because of our religious and moral beliefs, to serve all of God's people and to be the servant of no special interest groups. We advocate justice on behalf of those who are powerless and in need--not ourselves.

The implementation of the proposed amendments would hamper our agencies severely in our ministries, and we urge that the proposed amendments be withdrawn.

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Mr. John J. Lordan
Chief, Financial Management Branch
Office of Management and Budget
Washington, DC 20503

Dear Mr. Lordan:

Proposed Revision to OMB Circular A-122 Relating to Political Advocacy

The Machinery and Allied Products Institute (MAPI) wishes to respond to the notice in the Federal Register of January 24 inviting comments on a proposed revision to OMB Circular A-122, "Cost Principles for Nonprofit Organizations," which would broadly disallow, for such contractors, costs relating to what is termed "political advocacy." In addition, through separate actions by the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the General Services Administration (GSA), the text of the revision has also been proposed for application to all ("for profit" as well as nonprofit) contractors with the federal government.

As you may know, MAPI represents the capital goods and allied product industries of the United States. Although most of the companies in these industries are oriented toward commercial rather than government sales, these companies are the source of continuing technological improvement and product excellence and many of them are indispensable to the fulfillment of the government's requirements, particularly in the national defense area. Hence our deep interest in the federal government's procurement policies used in connection with its purchases from private industry, including the proposed disallowance of all contractor "political advocacy" costs.

We recognize, of course, that in a direct sense the OMB proposal concerns Circular A-122 which has applied only to nonprofit contractors and not to the "for profit" category of government contractor represented by MAPI. However, we understand that the separate actions of DOD, NASA, and GSA with respect to proposing the same regulation for "for profit" contractors were in effect mandated by OMB (as also seems indicated in OMB's official "Summary" which, together with a set of "informational" questions and answers, was included in the Federal Register notice concerning the proposed revision). Under the circumstances, therefore, we are addressing ourselves to the proposed revision as if it applied to all government contractors and grantees and not solely the nonprofit contractors which have been specifically covered by Circular A-122.



MACHINERY & ALLIED PRODUCTS INSTITUTE AND ITS AFFILIATED ORGANIZATION, COUNCIL FOR TECHNOLOGICAL ADVANCEMENT, ARE ENGAGED IN RESEARCH IN THE ECONOMICS OF CAPITAL GOODS, THE FACILITIES OF PRODUCTION, DISTRIBUTION, TRANSPORTATION, EDUCATION AND COMMERCE IN ADVANCING THE TECHNOLOGY AND FURTHERING THE ECONOMIC PROGRESS OF THE UNITED STATES



We are opposed to the proposed revision and urge that it be withdrawn. Indeed, in a letter dated February 23 to Director Stockman, we stated the following:

. . . [W]hat was intended initially as a relatively narrow effort has been allowed to mushroom to a point where the proposal goes beyond any reasonable concept and restriction. The definition of "political advocacy" is extraordinarily and unrealistically broad. In the real world of relations between the government and the private sector, the proposal would:

1. Disrupt and/or penalize normal and proper contacts between private entities and government officials;
2. Impede seriously government-initiated efforts to obtain the cooperation of private business with respect to public policy issues under consideration by one or more parts of government, particularly where the view of the Administration in office is shared by the private sector;
3. Further erode the allowable cost base of government contractors who already are denied allowance for certain costs that merit favorable treatment;
4. Create administrative problems of compliance that would be wholly inconsistent with the deregulation efforts spearheaded by the Reagan Administration; and
5. Utterly fail to serve the national interest in a true sense.

In our view, clearly this project has taken on the characteristic of a "runaway horse." The project should be slowed down and reevaluated in the light of those considerations cited above. . . .

We have noted the OMB announcement of February 25 that the proposed rules will be replaced by a revised proposal on which further public comments will be invited. Our comments are being submitted at this time in order to be helpful as OMB considers the project further.

We, of course, are pleased that the current proposed revisions are to be withdrawn but we urge that this project be scrapped in its entirety. As a practical matter, based on the overwhelming opposition to the proposal indicated at the hearing held by the House Government Operations Subcommittee on Legislation and National Security on March 1 and the suggestions from Chairman Brooks and other subcommittee members to that effect, we think that OMB should recognize congressional and public sentiment and announce that this project is terminated.

The Basic Issue--Application to
"For Profit" Contractors

The fundamental issue involved here, we think, is the attempt to apply across the board to all government contractors what apparently was initially designed as a restriction against certain nonprofit contractors and grantees. Frankly, a careful analysis of the impact of the proposed revision on "for profit" contractors will indicate that its application under these circumstances just does not make sense. In our judgment, there is an essential difference--which is not acknowledged in the proposed revision--between nonprofit and "for profit" contractors. The latter are commercial entities whose expenditures must be tied to profit objectives and the pressures of the competitive marketplace and whose responsibility is ultimately to their proprietors or boards of directors. As such they are not at liberty to engage in "political advocacy" spending unless such spending, most of which comes from their own funds, has some direct and obvious relationship to their business and its welfare.

On the other hand, many nonprofit contractors and grantees have no such "commercial" responsibilities and their funding may be entirely or substantially derived from the federal government. Any limitation which might conceivably be appropriate for such contractors should not apply, for the reasons indicated, to "for profit" contractors, particularly those whose business is predominantly commercial. And, as we noted at the outset, this predominant emphasis on commerciality is typical of the companies represented by MAPI. What these companies spend on any form of "political advocacy" is determined by the needs of their business. And the government should bear its reasonable and allocable fair share of any indirect business costs that are legally incurred and serve a legitimate business purpose.

Rationale for the Regulation

The "Summary" which was included in the Federal Register, along with the text of the proposed revision, discusses what presumably is intended to serve as OMB's justification for this action. Some comment on that rationale appears to be in order. First, the "Summary" indicates its concern "for protecting the free and robust interchange of ideas," thus implying an objective of attempting to strengthen First Amendment free speech. This is to be done by increasing the cost for government contractors to engage in "political advocacy." Thus there is an attempt to strengthen freedom of speech by making it more difficult to apply that right. This strikes us as some of the most convoluted reasoning we have heard in a long time. The obvious way to strengthen freedom of speech, in this context, is to recognize political advocacy as a valid indirect cost.

Secondly, it is stated that "[t]he definition of political advocacy used in this proposal is derived generally from the Internal Revenue Code, 26 U.S.C. 4911" However, this provision and Code Section 501(h) to which it relates concern excess expenditures for public charities to carry on propaganda or otherwise attempt to influence legislation. The two situations are hardly equivalent. Moreover, even if there was some similarity, which is not the case, it should be noted that the excise tax on excess expenditures for public charities does not apply to "appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence

of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization; . . ." (Section 4911(d)(2)(C)). This exception, of course, is not recognized in the proposed regulation here under discussion.

Statutory Background

The two major federal statutes on lobbying are the essential basis upon which an analysis of the proposed revision should be made.

The Federal Regulation of Lobbying Act

The Federal Regulation of Lobbying Act, a part of the Legislative Reorganization Act of 1946, imposes registration requirements in connection with activities designed to influence, directly or indirectly, the passage or defeat of legislation by the Congress. However, under the Act, the registration requirements expressly do not apply to a person who does nothing more than appear before a committee of the Congress in support of or in opposition to legislation.

In the *Harriss* case, the U.S. Supreme Court, in order to sustain the validity of the statute against constitutional objections, limited its reach to what is referred to as "lobbying in its commonly accepted sense"—to direct communication with members of Congress on pending or proposed federal legislation." As so limited, the Court held that the 1946 Act does not violate the freedoms granted by the First Amendment to the Constitution—freedom to speak, publish, and petition the government. But the Court made this judgment in the light of the fact that persons subject to the Act are merely required to register and to furnish information on their activities. It pointed out that Congress had not sought to prohibit such activities, and it seems implicit that any such prohibition or penalties with respect to such activities would probably have been held to be constitutionally invalid.

The Federal Income Tax Deduction

Under Section 162(e) of the Internal Revenue Code, originally added by the Revenue Act of 1962, a Federal Income Tax deduction is allowable for ". . . all the ordinary and necessary expenses . . . in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State . . . or a political subdivision . . . with respect to legislation or proposed legislation of direct interest to the taxpayer" So long as the legislation in question is of direct interest to the taxpayer within the meaning of this provision, expenses relating to either oral or written communications with either a member of Congress or a congressional committee are tax deductible.

In our view, proposed limitations--if any are determined to be necessary--on the allowability of political advocacy costs for contract purposes should be held within the confines of the statutory treatment of the tax deduction. Restrictive treatment beyond this point, in addition to being highly inappropriate from a policy point of view, raises serious constitutional questions which were alluded to by the Supreme Court in the *Harriss* decision.

It is obvious that the proposed political advocacy cost disallowance goes far beyond the scope of these existing analogous statutory provisions which apparently have been accorded no weight in the drafting of the proposal.

Key Provisions of the Proposed Revision

At this point, we discuss the key provisions of the proposed revision to the Circular. This analysis, in our judgment, supports the basic recommendation we have made above that the proposed revision be withdrawn.

Political Advocacy

Under Section b of the proposed revision, the following are included within the term "political advocacy," the cost of activities constituting which would be unallowable:

- (1) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsement, publicity, or similar activity;
- (2) Establishing, administering, contributing to, or paying the expenses of a political action committee, either directly or indirectly;
- (3) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof;
- (4) Attempting to influence governmental decisions through communications with any member or employee of a legislative body, or with any governmental official or employee who may participate in the decisionmaking process;
- (5) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf; or
- (6) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organizational purpose, or that spends \$100,000 or more per year on activities constituting political advocacy.

Categories one and three.—The first and third categories, elections and the like and grass roots lobbying, are not tax deductible under Code Section 162(e) and their cost disallowance under government contracts would simply accord with their federal tax treatment.

Category two.—Category two concerns political action committees (PACs). Certain activities relating to PACs can be classified as political advocacy, but

it should be recognized that such a classification for the purpose of the cost disallowance rules will create some great practical difficulties. Suppose the PAC uses corporate facilities or equipment in connection with its activities; does that make the entire cost of such equipment or such facilities unallowable? What about the salary of an employee who is active in the PAC? Or the salary of an employee who makes out and gives a check to the PAC, all on his own time? Total cost disallowance under these circumstances would seem both unreasonable and absurd.

Category four.--The key disallowance, to which there is the most fundamental objection concerning the "political advocacy" concept, is category four. This, in effect, would label as "political advocacy" any attempt to influence governmental decisions for any government official or employee--without regard to whether that individual was a part of the legislative or executive branch of government and without regard to the level of government (federal, state, county, or local). Thus it would not recognize cost allowability with respect to activity concerning legislation in which the contractor has a direct interest, as does Code Section 162(e) for federal tax deductibility.

In this connection, it should be realized that government contractors engage in many activities with respect to federal, state, and local legislative bodies, and officials and employees, which are necessary to assure timely and efficient performance of contract requirements, to enhance contract performance, or to obtain results beneficial to the federal government. For example, one of our member companies has reported to us that, with the encouragement and support of its corporate administrative contracting officer, it has pursued a vigorous course of action at local and state levels to prevent the imposition of property taxes on government-owned tooling.

We think that any such limitation on the legislative process should be left to the Congress or to the pertinent state or local legislative bodies.

Moreover, category four would constitute the first federal regulatory inhibition concerning nonlegislative political advocacy. We are strongly opposed to any attempt to label such activity as "political advocacy" for regulatory purposes. Congress, for its part, has rejected suggestions to this effect in connection with legislative proposals to reform the Federal Regulation of Lobbying Act in the past. The principal difficulty here is that there is an attempt to delimit advocacy with respect to executive branch departments and agencies by simply labeling it "political" and suggesting a connotation that it is therefore automatically suspect and should be curbed. In our view indirect costs of such activity, within reason of course, should be allowable.

Category five.--Category five relates to amicus curiae participation for a contractor in litigation in which it is not formally a party. Again this type of advocacy has never before been subject to constraints, and the attempt to establish such constraints is going to cause great difficulty. For example, one of our member companies has noted an instance concerning recent decisions of the California Supreme Court requiring contractors to pay accrued vacation pay to terminated employees without regard to whether the employee achieved a specified anniversary date. Unless overturned, this decision will increase the costs of contract performance; the legitimate interests of the federal government will be

served by seeking to have the decision reversed or narrowed. However, the proposed revision would have the effect of requiring each contractor to sue or resist suit in its behalf only. And such a result is clearly less economical to the federal government than allowing contractor amicus curiae contribution in a test case.

Category six.—Category six covers the payment of dues and other funds to an organization that has political advocacy as a substantial organizational purpose or spends at least \$100,000 annually on such advocacy. This frankly would cover most business associations with which we are familiar because generally such organizations state as one of their fundamental purposes what is referred to as public policy representation of its membership. Accordingly, the proposed revision would make the cost of membership in any such organization much more expensive than is currently the case for government contractor members.

Exceptions to Political Advocacy

Section c of the proposed revision spells out five classes of activities which are specified as not constituting "political advocacy." The key ones from our point of view, which would appear to offer the most likely possibility of some relief, are the second and fourth classes which read as follows:

(2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision;

* * *

(4) Applying or making a bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement; . . .

In our view, the exceptions which are provided by these classes are wholly inadequate. Class two provides an exception to a communication in response to a written request by a governmental body or committee so long as the response consists of providing technical advice or assistance to that governmental body or committee. Why should the request from the governmental body or committee have to be in writing? That presumably will mean that any telephone call request would have to be subsequently confirmed in writing. Moreover, the fact that the communication is in response to a request is, by itself, not sufficient; the advice or assistance provided must be "technical" in nature. We think that any technical advice or assistance should be within the exception, without regard to whether it was volunteered or requested.

Concerning class four—the marketing exception—it is inadequate because it would, in effect, permit communication only at the request of the government agency or in connection with a grant, contract, unsolicited proposal, or other agreement. We assume that any communication concerning a prospective sale which does not constitute an unsolicited proposal within the meaning of this rule, would

constitute the proscribed "political advocacy" regardless of the fact that the communication was unquestionably undertaken for marketing purposes. Moreover, there are many matters that concern government contracting but do not relate to a specific contract and thus presumably would not be covered by the exception—for example, negotiating forward pricing agreements, final overhead rate agreements, and resolving issues raised in connection with operations audits.

Political Advocacy by
an Organization

Section d covers the question of when an organization is deemed to have political advocacy as a "substantial organizational purpose." That provision states that if the organization's solicitations for membership or contributions acknowledge that the organization engages in activities constituting political advocacy, that would be sufficient to establish such advocacy as a "substantial organizational purpose." Such a rule, as we have indicated previously, makes absolutely no sense as applied to the typical business association representing "for profit" contractors because most such organizations typically claim public policy representation of their membership as one of their principal activities or purposes for existence.

The "All or Nothing" Rules

Section f of the revision establishes special rules with respect to cost unallowability for both salary costs of individuals and the costs of buildings, equipment, and the like. The basic rule here is that if there is any political advocacy activity whatever on the part of the individual in question (other than activities which are both "ministerial" and "non-material") or with respect to the building, office space, or equipment used, the entire function is viewed as contaminated and all of the salary or other costs would be considered to constitute political advocacy costs and would therefore be unallowable. In effect, this would mean that the complete salary of a corporate chief executive officer would be disallowed if that CEO engaged in any activity constituting "political advocacy" within the meaning of the proposed revision, regardless of how slight or inconsequential that activity might be as compared to that CEO's total activities. The same rule would apply with respect to the use of equipment, as is indicated by the third question in the question-and-answer series covering the use of a corporate aircraft for political activities as well as for the oversight and management of a federal contract. The only exception would be with respect to the use of a building or office space. However, in that case, if more than five percent of the usable space is devoted to activities constituting political advocacy, the entire rental or like costs would be disallowed.

The basic purpose of this "all or nothing" rule purportedly would be to avoid audit controversy over what should be an appropriate allocation between political advocacy and nonpolitical advocacy activities. But it seems to us that the end result of this rule, as applied, is to point out the absurdity of trying to make a complete disallowance of the cost when only a small part of the activity in question constitutes political advocacy, even within the strained meaning of the proposed revision. Comptroller General Charles A. Bowsher was very critical of this rule during his testimony in hearings on March 1 by the House Government Operations Subcommittee on Legislation and National Security.

These rules would disregard current accounting principles and standards with respect to both unreasonableness and allowability, and would be penal in nature. We have heard that they are intended to establish a "wall of separation" between political advocacy and other corporate activities. But this simply will not work; even large companies with Washington offices and legislative liaison activities would not be able to live with this rule. When they need expertise in connection with a matter relating to political advocacy, they normally will bring someone in the company, who is an expert in this area, to work with the Washington office and legislative liaison activity. And presumably the entire salary of that individual as well as those in the Washington office and the legislative liaison activity would be unallowable. This rule for complete cost disallowance is, we submit, patently unreasonable.

For all of these reasons, the proposed revision is unacceptable and should be rejected in its entirety.

* * *

This concludes our comments on the proposed revisions to OMB Circular A-122 relating to political advocacy. We will be prepared to comment on the revision of this proposal which OMB has indicated in its February 25 announcement that it expects to publish in about two weeks. However, our strong view is that the entire proposal should be scrubbed without putting government and business for any further period through the agony of trying to perfect a wholly faulty and unwise concept and project.

Sincerely,

Charles Stewart
President

mfm

cc: Edwin Meese III
Counsellor to the President

Edwin L. Harper
Assistant to the President
for Policy Development

David A. Stockman
Director, Office of
Management and Budget

Joseph R. Wright, Jr.
Deputy Director, Office of
Management and Budget



The Honorable Jack Brooks
Chairman, House Committee on
Government Operations
Subcommittee on Legislation and
National Security
Washington, D.C.

February 24, 1983

RE: March 1, 1983 Subcommittee
Hearing on OMB's Proposed
Amendment to Circular A-122

Dear Chairman Brooks:

We respectfully request that the following testimony, submitted on behalf of the National Anti-Hunger Coalition, Rural America, and the Food Research and Action Center, become a part of the record of the March 1, 1983 hearing on OMB's proposed amendment to Circular A-122.

Testimony

Claiming widespread abuse of current prohibitions on the use of federal funds by non-profit organizations for lobbying and electioneering, OMB has proposed regulations (48 F.R. 3348) which, if implemented, will dramatically restrict many non-profit organizations from participating in governmental decision-making even when private funds are used to finance such activities.

To date, neither OMB nor GAO have provided documentation of the alleged abuses, nor have they provided sound arguments as to why rigorous enforcement of current law will not achieve adequate compliance with Congressional intent.

We oppose the proposed regulatory amendment for the following reasons:

OMB's proposal is unconstitutional. It impermissibly conditions the receipt of federal assistance on waiver of the right of free speech. It restricts the exercise of free speech even when no federal funds are involved.

OMB's proposal flouts Congressional prerogatives. The Constitution places with the Congress the power to decide what limits shall be placed upon those receiving Congressionally authorized and appropriated monies. The Congress has prohibited the use of federal funds for lobbying or electioneering at tax-payer expense. However, mindful of the 1st Amendment and the lack of any credible evidence suggesting the need for further restrictions, Congress has not extended these prohibitions to private funds. Further, current Congressional prohibitions concerning the use federal funds by non-profits do not encompass the types of onerous restrictions OMB seeks to impose. OMB has usurped Congress' power by issuing the proposed regulation.

-2-

°OMB's proposal is excessive. It abandons "traditional cost allocation rules which appropriately disallow only the use of federal funds spent outside the authorized scope of grants or contracts. It disallows the entire annual costs of salary, facilities, equipment, printing and meeting costs if any federal or private funds are expended for the new and broadly defined "political advocacy".

°OMB's proposal is inequitable. Without justification it applies only to certain non-profit grantees, excluding the largest recipients of such federal funding. (Hospitals, universities and state and local government are exempted). Further, by allowing non-profits (and arguably, businesses under GAO, DOD and NASA) to provide input only at the invitation of a governmental body, it creates a scheme where favoritism, cronyism, and discrimination will inevitably flourish.

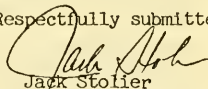
°OMB's proposal overreaches. They would prohibit non-profit organizations from communicating with any member or employee of a legislative body, or with any government official or employee who may participate in the decision making process, whether such contacts were funded with federal or private monies.

Conclusion

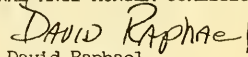
At the invitation of the federal, state and local governments, non-profit organizations provide essential services for many underprivileged persons. Without access to responsible governmental officials, the quality of such services will be diminished substantially. Costs of such services will rise and disruption will occur. Governmental decision-making should be a function of an open process, which includes the full exchange of ideas and information. The proposed changes in Circular A-122 will shut off that flow of information, both into and out of government.

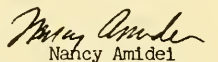
We urge that your Subcommittee thoroughly review the proposed regulations and the justification for their issuance. We believe the record will establish no basis for this unwarranted intrusion upon the 1st amendment. To assist your inquiry, we respectfully submit the following questions and urge that OMB officials be required to provide the Subcommittee with adequate answers to them.

Respectfully submitted,


Jack Stoller

THE NATIONAL ANTI-HUNGER COALITION


David Raphael
RURAL AMERICA


Nancy Amidei

THE FOOD RESEARCH AND ACTION CENTER

Some Questions for OMB on Part B33 ("Political Advocacy") of Circular A-122 ¹

Note: Throughout this document, the terms "grantee", "nonprofit", and "contractor" are used interchangeably, except as noted; "FFP" means federal financial participation in a grant, contract, or "other agreement"; "tainted" means regarded by OMB as engaging in "political advocacy."

1. OMB'S AUTHORITY AND RULEMAKING PROCESS

Federal laws already bar federal grantees and contractors from electioneering or lobbying Congress, directly or indirectly, at taxpayer expense. Does OMB intend for B33 to reach into judicial, legislative and administrative areas where Congress has refused to go? If so:

What is the source of OMB's authority to regulate federal contracts?
What is its source for regulating federal grants?

Does OMB regard its process of revising A-122 to be controlled by the Administrative Procedure Act? If not, what procedures are in effect for it? For example, is it governed by the Regulatory Reduction Act?

Does OMB intend for federal agencies to use B33 as an eligibility requirement for federal programs?

If so, what is the source of OMB's authority to impose new eligibility requirements on federal programs?

If not, how does OMB propose to prevent federal agencies from denying FFP to applicants that lack separate staffs, facilities, equipment, etc., even if they do not engage in political advocacy?

2. OMB'S JUSTIFICATION FOR THE PROPOSAL

What evidence does OMB have that federal agencies, using accounting standards, laws and rules already on the books, are unable to control alleged political abuse of federal funds?

What is the cite in OMB's preamble to GAO findings in this area?
Have the Inspectors General agreed that current policies are inadequate?

If political abuses are as widespread as OMB alleges, why has it exempted some of the largest federal recipients?

Why are universities, hospitals, state and local governments exempted?
Do universities and other institutions of higher education remain exempt if they accept DoD research contracts?
Are nonprofit organizations that they sponsor also exempt?

¹ Office of Management and Budget, "Cost Principles for Nonprofit Organizations," 48 Federal Register (1/24/83), pp. 3348-51.

3. SCOPE OF COVERAGE

What is the scope of federal assistance covered by OMB's proposed revisions to A-122, GSA procurement regulations, DoD acquisition rules, etc? For example, would they cover:

- free space in federal buildings? (eg, to veterans' organizations)
- free use of other federal property? (eg, patents, equipment)
- commodity procurements?
- commodity donations?
- PIK contracts?
- contracts of insurance?
- federal tax expenditures by organizations that deduct lobbying costs as "ordinary and necessary" business expenses?
- federal contributions to the United Nations?
- federal deposits in financial institutions?
- public/private partnership agreements?
- federal "categorical pass-through" funds reappropriated by states and used to make subgrants to nonprofits?

Does OMB intend to restrict political advocacy not only by organizations but also by individuals who receive federal funds? (eg, research grants)

How does B33 apply to comments from grantees on federal rulemakings like this one? What about at public hearings?

What does OMB include under "other agreements"?

4. FEDERAL COST IMPLICATIONS

The government now commonly finds cost sharing of grantee overhead and "core services" to be more economical than duplicating motor pools, accounting departments, etc.

What is OMB's estimate of increased federal costs that may result from the inability of grantees to continue sharing costs with non-federal funds and organizations that engage in political advocacy?

Does OMB plan to issue an inflation impact statement on its proposal? When?

5. IMPACT ON STATES AND LOCAL GOVERNMENTS

B33 appears to ban all unsolicited contacts between nonprofits and legislative, judicial or administrative officials and employees at local, state, and federal levels who "may participate in the decision-making process".

Does OMB intend to restrict state and local officials from accepting unsolicited participation by a federal grantee in their governmental decisions?

Would grantees be "tainted" by answering telephone inquiries from state or Congressional staffs? state or federal program managers?

How will restricting the exchange of ideas and information between nonprofits and program managers affect program quality, cost effectiveness, monitoring and correction of defects?

With regard to restrictions on grantee participation in state rule-making, would state planning processes developed under Executive Order 012372 that call for grantee participation as members of the public provide adequate written approval for such participation?

Apart from federal block grant and revenue sharing funds, does OMB intend to require states to apply B33 to their nonprofit subgrantees?

Does OMB intend to abolish or modify current federal rules that now apply A-122 to nonprofit sub-recipients of federal categorical "pass-through" funds? (eg 45 CFR 170.174 or 7 CFR 3015.193)

Will other OMB rules (eg, A-102, Attachment P) require states to audit federal grantees subject to A-122? If so, how will states be reimbursed for them?

6. IMPACT ON MEMBERS OF NONPROFIT ORGANIZATIONS

Does B33 place restrictions on political advocacy by individual members of a nonprofit organization apart from restrictions on their organization?

Apart from restrictions on communications with the public, may nonprofits claim FFP for costs of:

- presenting "political topics" to members? How does OMB define this?
- attempting to affect opinions of members on governmental decisions?

Do the same rules apply to communications with grantee board members?

To what extent may members of an organization engage in political advocacy on its behalf without "tainting" the organization itself? For example, could they talk to government officials on behalf of the organization?

Do the same rules apply to grantee board members? to volunteers?

To comply with B33, must a grantee somehow document the private political advocacy activities of organizational members, board members or volunteers on its behalf?

7. EMPLOYEES

B33 disallows FFP if grantees "require or induce" employees to engage in political advocacy, even on their own time.

Does "induce" mean something other than "require"?

Does "induce" include "peer- pressure"? Promotions? Awards?

May grantees claim FFP for salary costs of part-time workers who engage in political advocacy on another job?

What evidence must grantees maintain to prove that employees engaging in political advocacy on their own time were not "induced"?

8. CONSULTANTS AND SUBCONTRACTORS

Would cost-type subcontractors of federal grantees be subject to the same political advocacy restrictions as grantees? If so:

Would auditors also have to examine records of subcontractors?

What records would subcontractors be required to keep or furnish?

May grantees claim FFP for technical assistance by consultants who also engage in political advocacy for others?

May grantees claim FFP for political advocacy conducted on their behalf by law firms or other subcontractors?

Would a subcontract for political advocacy paid by a grantee from non-federal funds taint the grantee or only that subcontract?

9. PUBLICATIONS

Would FFP be allowed for the costs of distributing the results of "nonpartisan analysis" in a manner that attempts to affect public opinions on governmental decisions? What criteria would OMB expect agencies and auditors to use in judging whether the manner of distribution made such costs disallowable?

How would B33 apply to grantee newsletters containing political advocacy that only go to employees? to board members? to organizational members?

Would FFP be allowed for the costs of distributing research reports that advocate changes in public policy? Would there be any exceptions for distribution to review panels? other members of the professional community?

10. MEETINGS, CONFERENCES, WORKSHOPS

May grantees claim FFP for costs of attending or holding a conference during part of which:

- a Congressman or other public official advocated pending legislation?
- an employee engaged in political advocacy on his own time?

Would contract post offices in rural areas be tainted by political advocacy that routinely occurs around their "cracker barrels"?

11. FACILITIES

Under OMB's proposal, grantees may not devote more than 5% of building or office space they occupy (including that occupied by an "affiliated organization") to political advocacy.

Does this limit apply only to space occupied or to the entire building?

What is OMB's definition of "affiliated organization"? How does it differ from the IRS code?

Would grantees be tainted by political advocacy occurring on their premises that was conducted:

- by their landlords?
- by other organizations that share the same space?
- outside of working hours?
- on premises controlled by entities exempted from A-122 (eg, public schools, federal buildings)?

12. EQUIPMENT

May grantees claim FFP for costs of renting equipment also rented by others for political advocacy? If not, will rental companies have to keep separate inventories of "untainted" equipment?

Would grantees be tainted by allowing others to use their equipment for political advocacy? Even if fully reimbursed for operating costs (gas, electricity, etc.)? If so:

May libraries claim FFP for coin-operated copy machines used by library patrons to copy "political" documents?

May transportation grantees claim FFP for vehicles rented by others for political advocacy?

13. ASSOCIATIONS

May grantees claim FFP for any costs of membership in an association:

- that engages in political advocacy as a "substantial organizational purpose"? Apart from dues, what does OMB include under "costs of membership"?
- by documenting that its solicitation materials make no claim that it engages in political advocacy? Or would grantees be required to document its political advocacy expenditures?

Would member grantees be tainted by political advocacy conducted by their association? by a privately funded member of it?

Would OMB regard a grantee as engaging in political advocacy if:

- it appeared in stationery or publicity "for identification purposes only"?
- its employees made "uninduced" contributions in response to solicitations received at home? at work? What does OMB mean by "induce" in this context?

14. ACCOUNTING AND PAPERWORK BURDENS

Under B33, will it be sufficient for grantees to maintain records adequate to prove merely that they have charged no political advocacy to their federal grants? Or will they have the additional burden of maintaining records proving that they engaged in no political advocacy using any funds?

For example, will grantee accounting systems be required to track all non-federal funds, staff activities, use of space, telephones, inventory, etc., as well as federal funds?

Current accounting standards emphasize adequacy of accounting for federal funds. Does OMB believe that additional nonprofit accounting standards are needed to assure compliance with B33? For example:

Grantees now log their long distance calls for cost allocation purposes. Would B33 require them to log all local calls as well?

Similarly, their employees now prepare time sheets needed to properly allocate their work among various federal grants and contracts. Would B33 require grantees to keep records on their after-hours activities as well?

How much does OMB estimate to be the added regulatory burden of such requirements? Does OMB plan to issue a regulatory impact analysis? When?

15. AUDITS

OMB is currently circulating a proposal to require "single audits" of grantees under Circular A-110. How would it relate to the proposed revision of A-122?

The current scope of grantee audits is usually limited to their federal funds. Would B33 require auditors to examine their non-federal activities as well?

Current grantee audits examine transactions with respect to generally accepted standards of germaneness to grant purposes and "materiality". Auditors focus on transactions that depart from such purposes or that rise above such levels.

- How does B33 affect "materiality" levels?
- Would there be any transactions that are not "material"?
- Would auditors have to examine all grantee transactions or could they still just examine random samples?

What "audit steps" does OMB propose for detecting political advocacy?

Does OMB regard as adequate the quality of current audits of federal grantees? How would B33 affect the quality of such audits?

Does OMB estimate that B33 audits will cost more than current grantee audits? How much more? Will this cause an increase in federal costs?

CATCH-122 REVISITED: REAGAN ADMINISTRATION TINKERS WITH "GAG RULE"

On Feb. 25, on the eve of Congressional hearings and under a mounting blizzard of angry public comments, the US Office of Management and Budget (OMB) announced it was "considering modifications" of its proposed ban on "political advocacy" by nonprofit organizations receiving federal funds. But a report by the Congressional Research Service (2/18/83) has seriously questioned whether OMB's basic proposals are constitutional and a coalition of 250 national nonprofits that reviewed OMB's "modifications" has renewed its request for President Reagan to withdraw the entire proposal.

WHAT IS "CATCH-122"?

Nonprofits are audited regularly under OMB Circular A-122 ("Cost Principles for Nonprofit Organizations"), which details costs chargeable to federal grants: Federal funds may pay for a "fair share" of all costs incurred by grantees in carrying out legitimate, grant-authorized activities.

A-122 also implements federal laws prohibiting use of federal funds for electioneering, legislative lobbying, or activities outside the scope of grants and contracts. Other federal laws limit the amount of tax-exempt private funds that may be used in legislative lobbying. But otherwise, all members, volunteers, and employees of nonprofit organizations now have the same First Amendment rights as other Americans to speak out, organize, and complain to the government--so long as they do it on their own time and with their own funds.

On Jan. 24, OMB proposed changing A-122 to ban all their "political advocacy" as well, even using private funds. Under OMB's proposals (see 48 Federal Register 3348), nonprofit organizations would be banned from:

- contacting units of government at any level (unless officially invited)
- communicating government actions to members, interested people or the media
- joining associations that speak out for their communities and people they serve.

To comply with OMB's proposal, nonprofits would have to pay for separate "advocacy" offices, equipment and staff. Otherwise, federal auditors could force them to repay all federal funds spent for legitimate activities of any person, place or thing involved, however minimally, in "political advocacy." For example: if a teacher gave parents meeting one night in a day-care center some materials on pending day-care rules, the center might have to repay her entire annual salary and the entire annual rent, utilities, etc. for the building, even if parents paid for the materials.

OMB's proposals convert Circular A-122 into CATCH-122: Nonprofits with federal funds would be forced to choose between giving up their livelihoods or their First Amendment rights, under threat of bankruptcy.

OMB'S "MODIFICATIONS" — MORE THAN A SMOKESCREEN?**Exemption for state and local contractors and grantees**

OMB says its "proposals do not apply to state and local governments or their contractors and grantees, or to hospitals, universities, or Indian tribes" (emphasis added). This is both misleading and inequitable: If political abuse of federal funds is as widespread as OMB alleges, then it cannot justify exempting the biggest recipients.

It is true that A-122 does not apply to subgrants of federal block grant or revenue sharing funds, which OMB has already exempted from all federal cost principles. But what OMB does not say is that nonprofit contractors and grantees receiving federal "categorical pass-through" funds from state or local governments would automatically be covered by A-122 through other federal rules linking "cost principles" to type of fund recipient, rather than type of program (eg, 45 CFR 74.174). These rules apply OMB Circular A-87 to federal funds in state hands, but trigger A-122 requirements whenever states sub-grant funds to nonprofits. OMB has not proposed to strike down these other rules.

Exemption of "standard marketing activities"

This exemption would let military contractors and Rand Corporations continue lobbying Congress and the Pentagon for additional defense contracts simply by calling it "marketing," which belies OMB's initial claims of even-handed treatment for all federally-funded organizations. It would apparently exempt all commercial organizations and nonprofit contract research houses, leaving only the small nonprofits still covered. Note: Attachment C of A-122 exempts 30 large nonprofits by name, to be covered by GSA procurement (ie, "marketing") regulations.

Exemption of contacts with "non-legislative" state and local officials

This is no improvement over OMB's initial proposals, which exempted contacts with government officials necessary for carrying out a grant program, such as obtaining a state license to operate or discussing use of grantee property with zoning boards.

Most government decisions are "quasi-legislative," except for purely "ministerial" functions of administrative officials. For example, city councils and public service commissions have both administrative and legislative roles.

Exemption of "most" contacts with Executive branch officials

This gives capricious, life-and-death power over grantees to officials who are not accountable to the electoral process: If they decide that a contact was "inappropriate" or unwelcome, they could require the grantee to repay all federal funds related to it (annual staff salaries, telephone bills, etc.)

At the federal level, it is unclear whether officials of independent or regulatory agencies would be exempted, which is no help to a handicap transportation project that needs to contact the ICC to object to rules denying access to federal highways.

Establishment of a waiver policy for "inadvertent" or "technical" violations

The danger here, as above, is selective enforcement. Politically favored organizations would presumably have little trouble in proving "inadvertence," just as big organizations now experience little trouble in persuading auditors on lucrative long-term contracts to overlook "technical" violations.

Dues and membership in trade associations and "politically active" groups

For commercial organizations in trade associations, OMB assures that "rules for tax deductibility of such dues will in no way be affected by the proposals." This means that businesses may continue to charge their dues to federal taxpayers by deducting them as "ordinary and necessary" business expenses.

For nonprofits, however, "the proposals merely prohibit the use of federal grant and contract funds for the payment of such dues."

Exemption for providing information to trade associations and similar groups

This would apparently open a loophole in OMB's initial ban on providing "anything of value" to organizations that engage in political advocacy as a "substantial organizational purpose." It is designed to help certain trade associations for whom information itself is of value and costly to produce (eg, trade secrets, reports of crop production), but it is no help to "similar groups" of nonprofits that depend on their members for cash contributions, volunteer assistance, xeroxing, etc.

"Substantial" exemption of equipment usage

Since not all equipment would be exempt, substantial inequities could arise if, for example, OMB exempts federally-funded equipment used by government contractors (eg, shipyards, "mainframe" computers), while covering equipment purchased or obtained by federal grantees (eg, micro-computers).

OMB'S "MODIFICATIONS" WOULD STILL PROHIBIT MANY LEGITIMATE GRANTEE ACTIVITIES

How would organizations in your community be affected by A-122? Many currently legitimate activities would still be banned as "political advocacy" under OMB's "modified" proposals. If they received federal funds:

- Drug and alcohol abuse programs would be forbidden to advocate tougher laws against dope peddlers or drunk drivers.
- Nonprofit children's groups could not help in lawsuits against illegal removal of children from their parents.
- Agricultural organizations that pay for government research under cooperative agreements could not use their own funds to circulate the research reports to county officials.
- A church feeding elderly people could not use its cafeteria for a women's club meeting on social security legislation.
- Veterans organizations might be barred from asking cities to install curb ramps for wheelchairs if they accept free space in federal buildings.
- "Meals-on-wheels" programs for elderly shut-ins could not appeal to the city for neighborhood crime watch or elderly protection programs.
- Home weatherization projects could not seek lower utility rates for low-income or elderly people.
- Nonprofit halfway houses having trouble getting sites approved could not attend city council hearings, unlike city-operated houses funded from the same federal program.
- Theatre groups may be censored from presenting plays with "political" messages.
- Nonprofit clinics could not seek better children's immunization coverage from county health departments, but hospital clinics could do so (and for-profit clinics could deduct such lobbying as a business expense).
- Minority businesses with federal contracts could not attend chamber of commerce meetings on pending federal jobs programs.

- Nonprofit housing sponsors of projects in financial trouble would be barred from public hearings on city CDBG plans.
- Nonprofit Head Start centers could not contact school boards about better programs for ex-Head Start children, while school-operated Head Start centers would not be restricted.
- Nonprofit water/sewer associations could not seek extensions of city sewer lines.
- Nonprofit WIC centers could not object to putting junk food in mothers' packages, but county-operated WIC centers would be exempt.
- Energy projects would be barred from seeking changes in tax codes to encourage energy conservation.

OMB'S "MODIFICATIONS" FAIL TO MEET BASIC OBJECTIONS

A coalition of 250 national nonprofits has reviewed OMB's modifications and concluded that the entire proposal should still be withdrawn:

- It is unnecessary: OMB has still presented no evidence that anti-lobbying laws already enacted by Congress are failing to control alleged abuses of federal funds by nonprofits.
- It is unworkable: OMB has still not explained why certain nonprofits should be excluded from the open dialog over government policies at the very moment they receive federal funds to carry them out.
- It is unconstitutional: OMB has still not justified imposing such far-reaching and onerous controls on the privately funded First Amendment activities of nonprofits.
- It is unauthorized: Congress has passed no law against "administrative" lobbying. OMB still lacks proper grounds to issue these proposals.

PUBLIC COMMENTS

OMB has indicated that it may issue revised proposals with another 45-day comment period. In the meantime, the deadline for public comments is March 9, 1983. Comments should be addressed IN DUPLICATE to OMB with copies to your Congresspeople:

Financial Management Division, OMB,	Washington, DC 20503	(202/395-6823)
Hon. _____, US House of Representatives,	Washington, DC 20515	(202/224-3121)
Hon. _____, US Senate,	Washington, DC 20510	(202/224-3121)

For more information, contact:

Shannon Ferguson, Rural America, 1900 M St., Washington, DC 20036 (202/659-2800)

Testimony of State Senator Michael A. O'Pake/Pennsylvania
 Before the House Committee on Government Operations
 (Subcommittee on Legislation and National Security)
 The Hon. Jack Brooks, Chairman
 March 1, 1983

OMB Notice re Circular A-122/Federal Register January 24, 1983

In his classic study, *Democracy in America* (1835-39), Alexis de Tocqueville observed that "The Americans of all ages, all conditions and all dispositions constantly form associations ...associations of a thousand...kinds, religious, moral, serious, futile, restricted, enormous, or diminutive. The Americans make associations to...found establishments for education, to send missionaries to the antipodes. Whenever at the head of some new undertaking you see the government of France or a man of rank in England, in the United States you will be sure to find an association."

This propensity of Americans to join together in associations to support a cause, air their views, and demand government response, has grown stronger over the years, and is seen in the proliferation of private, nonprofit charitable and fraternal organizations which serve as vehicles for the public expressions of their members.

A parallel phenomenon of the last half century would merit de Tocqueville's comment were he alive today. The federal and state governments have learned these private, nonprofit special interest associations can economically, efficiently and effectively carry out many needed social, educational,

service and research functions that otherwise would be expected of government agencies, at greater cost. To encourage such nonprofit ventures, federal and state governments have provided tax incentives, and federal grants and contracts are awarded to these nonprofits to do the work government eschews. These grants and contracts annually total billions of dollars, and are awarded to hundreds of thousands of nonprofits, large and small.

Now, in the last month, the Office of Management and Budget, through an innocuous-sounding proposal entitled "Cost Principles for Nonprofit Organizations", is preparing to silence the voices of these grass-roots organizations. Under the guise of "sound management", OMB is moving to prevent nonprofits which receive federal funds from speaking out on public policy questions--even to their own members.

Thus, groups such as the United States Conference of Mayors, the National Alliance of Business, the National Savings and Loan League, the National Council of Senior Citizens, and the National Retired Teachers Association, each of which received substantial federal grant funds in 1982, would be unable to state their views on the state of the economy, taxes, interest rates, Social Security changes, educational benefits, and other pressing social issues, without jeopardizing their federal financial support. These, and thousands of other smaller groups involved in human services, will be forced to face the Hobson's choice of muzzling their members, or giving up essential federal funding.

In my own experience, these regulations would have denied me, as a State Senator, free and unlimited access to valuable insight and expertise in any number of past instances: when drafting our state Child Abuse statute, I relied on the hands-on experience of a reknowned psychiatrist on the staff of Children's Hospital in Pittsburgh, which nonprofit entity receives federal research funding through the National Institute for Health; and members of C.A.P.E. (Child Abuse Prevention Effort) of Philadelphia provided unique insight. C.A.P.E. has received at least one federal grant, and continues to contract with the Children and Youth Services agency, through which flow federal funds.

When working on my legislative proposal which established Victim/Witness protections in Pennsylvania, I received a considerable amount of relevant information from both the Rape Crisis and Domestic Violence Coalitions; both organizations draw down needed federal dollars. And I relied on the research made available by the Criminal Justice Section of the American Bar Association, which receives some federal funding.

Other federally aided nonprofits which have proven helpful to me in recent years include the National Council of Jewish Women, and member agencies of the Juvenile Justice Coalition of Philadelphia, on juvenile justice legislation; drug and alcohol program staff, on drunk driving legislation; Catholic Social Services on a variety of human service bills; and mental retardation activists and prison reform advocates on Task Force studies.

While the special interests of these nonprofits did not necessarily prevail, their commentary nevertheless provided a healthy dialogue which aided me in attempting to balance all interests. To deny these nonprofits access to public policymakers,

is to deny public policymakers comprehensive information on the impact of their decision-making. And to deny anyone, or to deny any association a voice in the democratic process is a very ominous step.

The proposed OMB policy should be abandoned because it is unconstitutional, unnecessary, unfair, and unwise.

Proponents of the OMB policy present the subtle, enticing argument that "commingling of federal grant (funds)... with private political advocacy creates the appearance of federal support for particular positions in public debate", and theirs is nothing more than a "concern for protecting the free and robust interchange of ideas".

Behind this facile facade lies the explicit political goal articulated by Howard J. Phillips, Executive Director of the Conservative Caucus, to "defund the left" by "eliminating the power...of activist organizations which are working...to render irrelevant the election returns".¹

The problem with both the visible and hidden agendas of the proponents is that the policy is blatantly unconstitutional.

More than a decade ago, in Perry V. Sinderman, the U. S. Supreme Court declared, "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit, and even though government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech."

1. "Defunding the Left", Rochelle Stanfield, National Journal, Aug. 1981, p. 1374

Twenty years ago, that same Court stated in Sherbert V. Verner, that "Conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms."

Because the OMB policy conditions the benefits of federal grants and contracts on the recipient's agreement to forego "political advocacy" as defined by OMB, it inhibits, deters and prevents the exercise of three critical First Amendment freedoms: free speech, freedom of assembly, and the right of citizens to petition their government for redress of grievances.

In addition to being unconstitutional, the proposed policy is unnecessary. At present, the Internal Revenue Code and other enabling laws¹ have explicit limitations on lobbying activities by nonprofits, which threaten loss of their tax-exempt status and access to continued federal funding if they "attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof". OMB's rulemakers complain present law is cumbersome, because separating money used to provide public services from the money used for lobbying is difficult. Though difficult, it clearly is not impossible. I am advised that at least five nonprofits in the Philadelphia area have lost federal funding in the last two years through enforcement of these restrictions.

Ironically, OMB does not propose to overcome this perceived difficulty, since it claims that "the body of experience in interpreting the Internal Revenue Code provisions...is expected

1. PL96-509 §227(c) Juvenile Justice and Delinquency Prevention Reauthorization Act of 1980

to aid the interpretation of the proposed (OMB) revisions". That claim itself seems ridiculous, since the OMB plan will exacerbate any difficulties, by expanding the definition of prohibited "political advocacy" beyond mere legislative lobbying, and will forbid efforts by groups "to influence government policy ...through the regulatory process" of administrative agencies, or in the courts "through litigation as amicus curiae" (friend of the court) briefs.

Even though the proposal is unconstitutional and unnecessary, the proponents assert it is at least even-handed. since similar policies, applicable to big defense contractors and other monied groups, were simultaneously announced by the Department of Defense. Nothing could be further from the truth. The OMB proposal discriminates against social policy-oriented nonprofits in favor of powerful corporate interests. The large government contractor can afford to set up a separate office and staff to conduct its "political advocacy" while it continues to get huge chunks of federal contract money to operate its business. But the small, mental health nonprofit, with two or three staff members, a two-room rented office, one telephone and a desk-top copying machine, simply cannot afford to set up a separate fictional entity to comment on government plans affecting mental health clients. It is simply unfair to shut off the cries of the disabled, the poor and the elderly, who cannot travel to their state capitol or to Washington to protest government administrative, legislative or judicial action.

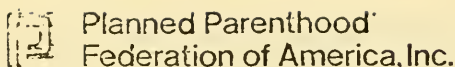
7.

Finally, the OMB proposal is unwise. In the first place, it would force federal auditors to become policemen of policy, changing their role from financial analysts to detectives of discourse. Auditors would have to determine not only what federal dollars were spent where, but why they were spent, and whether any federal money was expended on "political advocacy". Such a wide-open standard is subject to abuse by potentially vindictive government agency personnel, and cannot help but have a chilling effect on the people who work for and belong to nonprofit organizations.

The rulemakers at OMB appear to view "political advocacy" as dirty words. Journalist Godfrey Sperling, Jr. comments, however, in his "Washington letter" column of February 23, 1983 in The Christian Science Monitor, that "...politics actually is the process...the debate that goes on constantly among the American people on a multitude of issues."

While those of us in elective office would be the first to concede that the democratic process can be messy, noisy and time-consuming, we surely must agree with Sperling's conclusion that, "...if it is to work there must be a perpetual interchange of public opinion. Thus politics, in the sense of continuing debate, must go on."

I am convinced the cumulative effect of OMB's "gag order" would be to cut the torrent of information we public officials now receive from nonprofit groups to a small, ineffective trickle. OMB would silence the debate. I therefore call on Congress to prevent implementation of these regulations because they are unconstitutional, unnecessary, unfair, and unwise, and they would weaken our noble democratic experiment.



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Testimony of:

PAYE WATTLETON

PRESIDENT

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

* * * * *

House Government Operations Committee
Subcommittee on Legislation and National Security

March 1, 1983

Planned Parenthood Federation of America and its 190 local affiliates in 43 States are proud of their role in public affairs, as advocates on behalf of reproductive health care for millions of Americans. We feel that it is essential that Planned Parenthood with its 20,000 volunteers and staff nationwide, and other family planning service providers be allowed to continue speaking out in the interest of all the people we serve.

Virtually all Planned Parenthood affiliates have public advocacy activities of some kind, staffed either by volunteers or professional staff, backed up by a Public Affairs Committee composed entirely of volunteers from the affiliate's Board of Directors. These volunteers typically represent all corners of the local community. The public advocacy activities of the Affiliate are supervised by the affiliate's Executive Director. We believe it is essential for the individual with direct responsibility for the administration of all our service programs to be actively involved in the public advocacy functions as well. (Under the current system, the Executive Director's salary is paid from privately raised funds for activities, including advocacy, not related to the federal grant.) Under the current OMB proposal, that would be impossible if the Executive Director receives as little as 5 percent of his/her salary from federal funds.

Planned Parenthood, I believe, is in a unique position to comment on the use of allocations of grant and non-grant costs. During 1981, Planned Parenthood and other family planning organizations who receive federal family planning grants experienced an unprecedented number of program audits by both the Department of Health and Human Services Inspector General and the General Accounting Office. It is important to note that both GAO and the HHS Inspector General were concerned only with the use of federal funds, not privately raised monies. In these audits two main subjects were addressed:



did family planning clinics use federal funds for abortion related activities or for lobbying?

On both counts, and by both agencies, family planning clinics were cleared of any serious misuse of funds. That there was no finding of a pattern of misuse by any family planning service providers completely contradicts OMB's stated premise for their proposed revision to cost principles. I would urge you all to read the GAO's Report on Family Planning Grantees. The Report Number's 82-106, September 24, 1982.

I would also note that GAO, in testimony before the House Government Operations Committee earlier this week stated that their findings and recommendations in the family planning audits should not be construed as a basis for OMB's drastic proposal.

The OMB proposal would be extremely harmful to Planned Parenthood through its vast expansion of the definition of public advocacy. We feel it is absolutely essential for Planned Parenthood affiliates to be able to conduct a free exchange of views and information with state and local officials and with members of the local community with its funds raised from private contributors. There are currently statutory restrictions on the use of federal funds for lobbying. The OMB regulations, however, far exceed these requirements. They impose restrictions on the use of non-governmental funds in excess of OMB authority, and far beyond any measures enacted by Congress.

As health care providers, Planned Parenthood affiliates have played an important role in the total well-being of local communities across the nation. They, along with other service delivery organizations, must not be kept out of the sphere of public debate simply by virtue of their receipt of federal dollars.

Planned Parenthood has also been active in the federal rulemaking process, something that would be barred by OMB's proposal. Last year Planned Parenthood affiliates, in coalition with one hundred other national youth serving groups, played a major role in generating public interest around a governmental proposal that would have required federally funded clinics to notify parents when teenagers are provided prescription contraceptives. More than 120,000 public comment letters were generated. At the local level, affiliates volunteers were instrumental in encouraging state, county, and local health officials to write comment letters on the proposed rule. In the end, 40 State Health Departments and the District of Columbia wrote official letters of comment, all of them opposing the rule. Hundreds of county and local health officials wrote similar letters. This work, funded entirely by private contributions, is an example

of the effective communication between our public affairs volunteers and other local organizations and governments.

The important point for our discussion today, though, is that, organizations that have day-to-day experience in providing services must have some voice, some opportunity to participate in the debate about so radical a change in the program's method of operation. The public-private partnership that Brian O'Connell of Independent Sector has spoken of and that the Reagan Administration touts so loudly, cannot exist with private organizations silenced.

In closing, I would like to quote from the February 17 editorial of the Minneapolis Star-Tribune:

"In a country that thrives on debate and dissent, the administration's proposal to throttle its critics is out of place. The plan would save no money and solve no problem. It would only restrict the kind of communication that helps the government do its job well. So long as they don't use federal money to do it, the groups that help the country's needy citizens should be able to speak out whenever they want, about whatever they want."



United Cerebral Palsy Associations, Inc.
Governmental Activities Office
Chester Arthur Building, Suite 141
425 I Street N.W.
Washington, D.C. 20001

(202) 842-1266

March 2, 1983

John L. Lordon
Chief
Financial Management Branch
Office of Management and Budget
Washington, D.C. 20503

RE: January 24, 1983 Proposed Regulations
Revising Circular A-122, "Political Advocacy"
of Nonprofit Recipients of Federal Assistance

Dear Mr. Lordon:

United Cerebral Palsy Associations, Inc., one of America's larger voluntary health agencies, wishes to join the chorus of concern objecting to OMB's proposed January 24th regulations. Founded in 1949 by parents of children with cerebral palsy, UCPA's 1981 national office budget was \$4.833 million, an amount entirely derived from non-governmental sources. Our combined affiliate income of \$142.922 million including \$101.526 million from state and local government grants and contracts provide a variety of direct services to persons with severe disabilities and their families. UCPA affiliation policies prohibit any government funds from being shared with the national organization. Only privately raised funds are assessed by the national organization. At present your proposed regulations do not appear to apply to us. But we join the many others in the nation who object to your proposals. We have seven major concerns with your proposals.

- Consistency

UCPA, an Internal Revenue Code Section 501 (c) (3) organization, already is governed in terms of its lobbying activities. We support the 1976 IRC amendments which establish an expenditure test to limit the lobbying activities of charitable organizations. We suggest that A-122 rules parallel as closely as possible these IRS rules. Dual standards which are substantively different are a regulatory burden and undermine administrative efficiency of both federal agencies and nonprofit organizations.

- Need

OMB has not documented evidence of abuse by the nonprofit community. Anti-lobbying laws for recipients of federal funds are already in place. OMB has not documented why generally acceptable accounting techniques are not adequate. Why issue substantial new regulations in an area with no documented abuse? It seems odd for an Administration committed to deregulation to develop a new regulatory process when no abuse has been demonstrated.

LEONARD N. GOLDENSON
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VICE PRESIDENT
MEDICAL AFFAIRS

EARL H. CUNYER
EXECUTIVE DIRECTOR



- Authority

It appears to UCPA that the January 24th regulations go well beyond Congressional intent and exceed the regulatory authority of OMB. These proposals clearly go beyond any current restrictions which Congress has placed in the HHS appropriations measures. OMB has regulatory authority to formulate general cost allocation rules. We remind OMB of the 1936 Supreme Court case, Manhattan General Equipment Co. vs Commissioner of Internal Revenue, whereby the Court observed that the executive branch "is not the power to make law" but, instead, is only "the power to adopt regulations to carry into effect the will of Congress as expressed by statute."

- Reasonableness/Arbitrariness

Can not OMB obtain the results it is seeking without requiring the extreme segregation of activities the proposals entail? By requiring grant activities and an organization's lobbying activities to be placed in separate buildings, the result is higher costs to both the government and the recipient. The historical common practice of in-kind matching would be completely eliminated.

Brian O'Connell, President, Independent Sector, has described a discussion he has had with Michael Harowitz, OMB's General Counsel, whereby Mr. Harowitz has interpreted the January 24th rules as prohibiting an executive director from supervising both an agency's grant activities and its lobbying activities. Is it reasonable for an executive director, by government regulation, to neglect his responsibilities to his Board of Directors and completely delegate absolute authority of one area to another staff member? UCPA believes your proposals are both unreasonable and unnecessarily arbitrary.

- Prematurity

We remind OMB that the Supreme Court has heard arguments and is now considering, in Taxation Without Representation vs Donald Regan, a case involving the government's authority to regulate a variety of nonprofit associations and their lobbying activities. We suggest that OMB wait to issue proposed regulations to insure consistency with the Court's findings.

- Subjectivity

Prohibitions on activities such as "attempts to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof" are highly subjective. A public administration principle taught throughout the nation is that rules must be uniform and precise enough so that they can reasonably be implemented in similar ways by different officials of government. Vague phrases lend themselves to misuse by ideologically motivated federal officials. We oppose any rule which is so subjective that it probably can not be uniformly and consistently applied.

- Vagueness

The regulation does not define what constitutes federal funds. We understand that OMB has determined that block grant funds distributed by state and local government to nonprofits are not covered by these rules. But what about other

federal funds distributed to state and local government which are then granted or contracted to nonprofits? Many, maybe even most, state legislatures reappropriate federally received funds and these state laws clearly maintain that these are state funds. Does your regulation apply to pass-through grants or contracts? This is a highly important issue to organizations, such as UCPA, which are membership associations with affiliation agreements.

As OMB moves to issue revised proposed regulations during the next several weeks, we hope you will respond to the seven concerns expressed in this letter. Thank you for considering our views.

Sincerely,

E. Clarke Ross

E. Clarke Ross, D.P.A.
Director

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ANALYSIS OF POTENTIAL LEGAL ISSUES WHICH MAY BE RAISED CONCERNING OMB
PROPOSED AMENDMENT TO CIRCULAR A-122, REGARDING POLITICAL ADVOCACY
BY NONPROFIT GRANTEEES OF THE FEDERAL GOVERNMENT

Jack Maskell
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American Law Division
February 18, 1983

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